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ABSTRACT

A wide variety of contemporary legal issues, involving all levels of public and private education, are addressed in the 20 papers in this volume. Written in law review style and including legal citations, the papers and authors included are: (1) "Who Runs the Schools" (Flygare); (2) "Copyright Issues in Computer-Assisted Instruction" (Helm); (3) "School Desegregation Litigation and the Financing of Remedial Decrees" (Vergon); (4) "Construction Management for Educational Facilities" (Goldblatt and Wood); (5) "Punitive Damages in Civil Rights Actions" (Frels); (6) "Interpreting the Education of the Handicapped Act" (Thomas); (7) "State Action and the Public Spheres Doctrines" (Batson); (8) "Section 1983 Liability" (Vacca); (9) "The Implications of 'Good-Faith' Negotiation Provisions for 'Meet and Confer' Laws" (Baldwin); (10) "An Instrument for a Legal Review of Public School Curriculum Policies and Procedures" (Zirkel); (11) "Academic Penalties for Student Misconduct" (Hooker); (12) "Faculty Dismissal" (Mawdsley and Permuth); (13) "Minimum Competency Testing" (Pullin); (14) "Arbitrary and Capricious Nonrenewal Decisions" (Phay); (15) "Recent Litigation Concerning Separation of Church and State" (Epley); (16) "Current Litigation Involving School Finance Issues" (Sparkman); (17) "Justiciable Performance Standards for Discharging Incompetent Teachers" (Clear and Box); (18) "Title IX" (Sorenson); (19) "Legal Challenges to Compulsory Attendance Laws" (Beckham); and (20) "Due Process Prevents Educators' Doing Only What They Should Not Do" (Wayson). (AA)

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Who Runs the Schools: Judges or Educators

Thomas J. Flygare

Education, like many other aspects of American life, has been through a period where legislatures, courts, and governmental agencies have emphasized the rights of individuals and have dramatically curtailed the ability of elected officials to carry out policies and practices they believe reflect the will of the majority of the voters. This tension between the rights of individuals and the will of the majority has been with us since the United States Constitution was considered for ratification. The original Constitution contained seven articles describing the power of elected and appointed officials of the federal government. When the Constitution was considered for ratification by the states, some states balked because the Constitution did not contain a delineation of the rights of individuals. Therefore, a Bill of Rights was drafted and added to the Constitution as the first ten amendments.[1] As a result, for example, individuals in the United States enjoy freedom of speech and religion and freedom from unreasonable searches and seizures and from compelled self-incrimination. Individuals possess these and other rights under the Bill of Rights even though the majority of voters in a particular jurisdiction might seek to curtail such rights.

The balancing of individual rights and the will of the majority has occupied a good share of attention from the courts in the last 200 years. Indeed, most constitutional cases decided by the Supreme Court involve situations where elected or appointed officials attempt to carry out policies which, it is alleged, conflict with the rights of individuals. The whole area of free speech, for example, involves an extremely difficult balance between society's desire to be free from provocative or obscene speech and the rights of individuals to engage in a dialogue on matters of public interest. No absolute solutions have been developed and, it is safe to say, no final solutions to these difficult issues will ever be established.

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[1] G. Gunther & N. Dowling, Constitutional Law: Cases and Materials, 782 (7th ed. 1970).

It is in this context of the balance between the will of the majority and the rights of individuals that we should examine legal events in education over the past twenty-five to thirty years. It is the view of this observer that beginning in the 1950s and running through the mid-1970s, we witnessed a series of events which identified and enforced individual rights at the expense, in many instances, of the ability of school boards and legislatures to carry out what they perceived to be the will of the majority of voters in their jurisdictions. In many instances, the reforms were long overdue; in others, the timeliness of the actions can be questioned.

The trend emphasizing individual rights began, in the judgment of this observer, in 1954 when the Supreme Court in *Brown v. Board of Education of Topeka, Kansas* decided that it was a violation of the equal protection clause of the fourteenth amendment to separate children on the basis of race in the schools.[2] Thus, the ability of state legislatures and school boards in those southern and border states to carry out what they thought was the will of the majority of voters was curtailed in the interest of the rights of individual students to be free from discrimination in their educational program.

The emphasis on individual rights was furthered in 1964 when Congress passed the Civil Rights Act.[3] Among the provisions of that law were Title VI banning discrimination on the basis of race, color and national origin in programs or activities receiving federal funding and Title VII which outlawed discrimination on the basis of race, color, national origin, and religion in private sector employment decisions.

The Supreme Court got back into the act in 1968 when it decided *Pickering v. Board of Education* holding that public school teachers have the right to engage in free speech activities regarding issues of public interest.[4] Mr. Pickering, a public school teacher, had written a letter to the editor of the local newspaper criticizing the way in which the school board handled a bond issue and the athletic budget. He was terminated by the school board but reinstated following the Court's ruling that teachers had the same free speech rights as other citizens, with some minor exceptions. A year later, in *Tinker v. Board of Education,* the Supreme Court held that public school students have the constitutional right to engage in nondisruptive symbolic speech *inside* the school building.[5] Prior to *Tinker,* it was generally assumed that students relinquished their constitutional rights when entering the schoolhouse. In *Tinker,* several students were suspended for wearing black arm bands to protest the Vietnam War. The Supreme Court held that students could not be punished for engaging in free speech activities unless they caused actual disruption or unless the school officials could forecast that the free speech activity would lead to substantial disruption to the educational process.

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[2] 347 U.S. 483 (1954). *See* R. Kluger, Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality (1975).

[3] 42 U.S.C. § 2000 (1964).

[4] 391 U.S. 563 (1968).

[5] 393 U.S. 503 (1969).

Congress reentered the picture in 1972 with two actions. First, it passed Title IX of the Education Amendments which prohibited discrimination on the basis of sex in any education program or activity receiving federal educational funding.[6] Second, it amended Title VII of the Civil Rights Act to include sex discrimination as a prohibited employment practice and extended the coverage of the Act from just the private sector to states and political subdivisions of the states such as municipalities and school boards.[7] Thus for the first time the employment practices of school boards became subject to the federal law prohibiting employment decisions on the basis of race, color, national origin, religion, and sex.

This was followed in 1973 by the passage of section 504 of the Rehabilitation Act which prohibited discrimination on the basis of handicap in programs receiving federal financial assistance.[8] In 1974, Congress passed the Family Educational Rights and Privacy Act, commonly known as the Buckley Amendment, mandating sweeping changes in the student recordkeeping practices of most schools and colleges.[9]

In early 1975, the Supreme Court decided two cases on the same day which probably represented the apex of the emphasis on individual rights in education. In one case, *Goss v. Lopez,* the Court ruled five-to-four that public school students were entitled to procedural due process prior to even short-term suspensions.[10] In a companion case, *Wood v. Strickland,* the Court held that school board members could be sued personally for money damages if they knew or should have known that actions taken against students violated the students' constitutional rights.[11] Thus, on the same day, the Supreme Court decided a case defining new constitutional rights for students and another holding that if that right or any other constitutional right were violated money damages could be recovered personally from elected local school officials.

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[6] 20 U.S.C. § 1681-82 (1972).
[7] 42 U.S.C. § 2000 (1972).
[8] 20 U.S.C. § 1405 (1973).
[9] 20 U.S.C. § 1232g (1974).
[10] 419 U.S. 565 (1975).
[11] 420 U.S. 308 (1975).

Beginning in the middle 1970s, however, indications began to surface that the Supreme Court was shifting away from an emphasis on individual rights and toward a position more supportive of the right of elected officials to carry out policies and practices perceived to be in the best interest of the majority of voters. The first such indication in education occurred with the 1973 case of *San Antonio v. Rodriguez,*[12] in which the Supreme Court ruled five-to-four that it was not a violation of the equal protection clause for Texas to rely primarily upon the local property tax to finance schools even though such reliance led to wide fluctuations among school districts in the dollars available per student from school district to school district. In so doing, the Court held that education was not a "fundamental interest" under the Federal Constitution. Thus, the Court not only foreclosed the Federal Constitution as a basis for challenging school finance practices in the state but also called a halt to further expansion of individual rights in the schools under the banner of the equal protection clause. It is really quite impossible to say what education would be like and how it would be financed if the Supreme Court in *Rodriguez* had decided the other way.

The unwillingness of the Supreme Court to identify new individual rights in education continued with the Court ruling in 1977 that students were not entitled to a due process hearing prior to the administration of corporal punishment.[13] In this case, *Ingraham v. Wright,* the Court also held that corporal punishment was not "cruel and unusual" punishment prohibited by the eighth amendment to the Constitution. In 1978, the Court held in *Horowitz v. University of Missouri* that students were not entitled to a due process hearing prior to an academic dismissal.[14] *Ingraham and Horowitz* together gave a strong signal that the Supreme Court was not inclined to expand procedural due process rights beyond the narrow disciplinary penalties outlined in *Goss v. Lopez.*

In 1981, the Court decided in *Texas Department of Community Affairs v. Burdine* that in a Title VII discrimination case the burden of proof falls squarely on the person alleging discrimination and that it is not the responsibility of the employer to prove absence of discriminatory intent.[15] *Burdine* makes it clear that while individuals have the right to be free of discrimination in employment decisions it is the responsibility of the individual to prove discrimination, not the responsibility of the employer to prove the absence of discrimination. The language of *Burdine* decision, contained in a unanimous opinion written by Associate Justice Lewis Powell, makes it very clear that compliance with Title VII requires that an employer have neutral personnel policies but does not require any preferential treatment whatsoever for women and minorities.

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[12] 401 U.S. 1 (1973).
[13] 430 U.S. 651 (1977).
[14] 435 U.S. 78 (1978).
[15] 101 S. Ct. 1089 (1981).

Another potentially serious blow to individual rights was dealt in the case of *Board of Education, Island Trees Union Free School District, v. Pico,* the school library censorship case.[16] A school board on Long Island removed nine books from the school libraries without following the established procedure for reviewing library materials.[17] Several students in the school district filed suit alleging that the board's action infringed upon their first amendment right to have access in the school library to a wide range of views on current social, political, and economic issues. The case found its way to the Supreme Court and provoked wide disagreement among the Justices, with almost every Justice writing a separate opinion. Justice Byron White, however, was unwilling to address the merits in this dispute and consequently the case was sent back to the federal district court for a trial. The importance of this case in the context of this analysis is that four Justices — who probably represent the dominant ideological tone of the court in future years — found that there were no individual rights implicated by a school board decision to remove books from school libraries.

Another case suggestive of the emerging judicial support for elected school officials is *Board of Education of Rogers, Arkansas v. McCluskey.*[18] In the fall of 1980, when Pete McCluskey was a high school sophomore in Rogers, Arkansas, he and some friends left school after the first period, did some drinking, and returned later in the day for a band trip. They were suspended and subsequently had a hearing before the school board which affirmed the suspension. McCluskey sued alleging that he had been denied due process because the school board had unreasonably interpreted rule 11 of the code of discipline which prohibited "being under the influence of any drug." The lower courts held that McCluskey's suspension was illegal

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16 102 S. Ct. 2799 (1982).

17. The nine books were *Slaughterhouse Five,* by Kurt Vonnegut, Jr.; *The Naked Ape,* by Desmond Morris; *Down These Mean Streets,* by Piri Thomas; *Best Short Stories of Negro Writers,* edited by Langston Hughes; *Go Ask Alice,* of anonymous authorship; *A Hero Ain't Nothin' but a Sandwich,* by Alice Childress; *Soul on Ice,* by Eldridge Cleaver; *The Fixer,* by Bernard Malamud; and *A Reader for Writers,* edited by Jerome Archer.

18. 458 U.S. 966 (1982).

because although technically alcohol is a drug it is not commonly referred to as a drug. The Supreme Court on a five-four vote reversed the lower courts and held that the federal judiciary had no business whatsoever second-guessing local school board officials on the interpretation of a local disciplinary rule. The importance of this decision is magnified because the Supreme Court issued its decision in a summary fashion without receiving briefs from the parties or hearing oral arguments.

Another case that can be cited as evidence of a trend away from individual rights in favor of the rights of local officials is not a school case but one which will have significant impact in the schools. The case, *Connick v. Myers,* involved an assistant district attorney in New Orleans who opposed a proposal by the district attorney to transfer her to a different section of the criminal court.[19] She distributed a questionnaire to the other assistant district attorneys in which she asked, among other things, about office morale, the need for a grievance committee, and whether there were any pressures to work in political campaigns. Myers was immediately terminated from her position. She challenged the termination in court, alleging that dismissal was caused by the exercise of constitutionally-protected speech. The Supreme Court in another five-to-four decision, upheld Myers' termination. The majority opinion, written by an Associate Justice Byron White, acknowledged that Myers had been fired because of the questionnaire and that at least one question touched upon a matter of public interest. Although this would have normally been enough to overrule Myers' termination, White reasoned that all of the circumstances in the situation had to be balanced before deciding the constitutional issue. He noted that the questionnaire was distributed largely in the context of a personal dispute between the district attorney and Myers, that Myers had used office time to prepare and distribute the questionnaire, and that she really hoped to precipitate a vote of no confidence in the district attorney. For these reasons, Myers' right to engage in constitutionally-protected free speech activities was outweighted by the right of the employer to terminate disgruntled employees. This so-called balancing approach to termination cases involving the first amendment activities substantially reduces the individual rights articulated fifteen years earlier in *Pickering.* The courts must apparently now judge such cases on a case-by-case rather than applying the rather clear principles emanating from *Pickering.*

Based on the events outlined above, it seems clear that we are now

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19. 103 S. Ct. 1684 (1983).

in the midst of a trend where the pendulum is swinging away from the emphasis on individual rights and back toward support for the authority of elected officials to carry out what they perceive to be the will of the majority of the voters in their jurisdictions. If indeed the pendulum is swinging in this direction, as this observer thinks it is, we in education are entering a very difficult period of adjustment. I don't want to suggest that conflicts between individuals and the schools are prevalent. Yet many of the individuals with whom we deal, such as students, employees, and parents, have their perceptions of individual rights firmly rooted in the legal concepts of the early 1970s. That is, many individuals will assume that when the rights of individuals come into conflict with the policies of elected officials that the individual rights supersede institutional authority. On the other hand, however, elected officials are becoming more attuned to the likelihood that the courts will support the institutions when a dispute over individual rights occurs.

Thus we may be in a period of the proverbial irresistible force and immovable object. This calls for great sensitivity, tolerance, and a spirit of good will and cooperation. If litigation is to be avoided during this period, elected and appointed officials have to be counseled against misusing their new found support from the judiciary. It is incumbent upon educational administrators and lawyers working with school boards to make every effort to resolve disputes in an equitable way with due regard for the rights and interests of all parties. Even though we now believe that the courts will provide a more receptive forum for resolving disputes involving the schools, it would be unwise to push disputes into litigation at every opportunity.

If we in education have learned anything over the last several decades it is that litigation rarely results in solutions which are educationally sound. Therefore, it behooves us to conduct our affairs in a manner calculated to respect the rights of individuals while at the same time providing effective educational programs in the schools.

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Copyright Issues in Computer-Assisted Instruction

Virginia M. Helm

Though computers have been in some schools for nearly two decades, it is the arrival of the microcomputer that has allowed — or forced — educators to incorporate computer-assisted instruction into their classrooms. As these little machines have begun whirring and clicking in classrooms, libraries and labs, educators have responded with the range of human emotions ranging from excitement to dread. Whatever their emotional state, however, many computer-using educators have already begun a pattern of illegal use of computers in the school environment. Some do so in blissful ignorance, others with vague intuitions of wrong-doing, and regrettably a few knowingly and blatantly ignore the frustrating restrictions contained in the copyright law.

What are the copyright restrictions imposed on the use of computer hardware and software? And what are the legally questionable if not outright unlawful uses of instructional software? Many educators know or at least sense that making duplicate copies of a disk is both ethically and legally dubious. But most would be incredulous to learn that they are probably violating the copyright law when they sequentially boot up a series of microcomputers with one disk, thereby enabling multiple student users to access a program (now in the computer's memory) for which there is only one purchased disk. If confronted, these educators would probably respond: "But I'm not making duplicate copies. How can I possibly be breaking the law?" Likewise, in a school system where one or more teachers has acquired some degree of sophistication with microcomputers, we may find that several students are simultaneously accessing one program via a network of linked micros. This arrangement, too, could be illegal, depending upon several variables to be explored below.

What the Copyright Law Says

In order to understand why these and other seemingly innocuous uses of instructional software are illegal or at least legally questionable, we must look first to the copyright law itself. The 1980 amendments (P.L. 96-517) to the comprehensively revised, updated copyright law of 1976 (P.L. 94-553) contain two major provisions pertaining to computers.

Title 7, section 10 contains the definition of a computer program.

> A "computer program" is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.

How a computer program may be used is defined in Title 7, section 117.

> Notwithstanding the provisions of section 106, it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided:
>
> (1) that such new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or
>
> (2) that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful.
>
> Any exact copies prepared in accordance with the provisions of this section may be leased, sold, or otherwise transferred, along with the copy from which such copies were prepared, only as part of the lease, sale, or other transfer of all rights in the program. Adaptations so prepared may be transferred only with the authorization of the copyright owner.

A close reading of section 117 discloses three different referents for the term "copy." First, subsection 1 refers to the intangible copy in the computer's memory (ROM) made when the user inputs a piece of software into the computer. That copy, in most instances, self-destructs when the computer is turned off or when the user otherwise removes it from the central storage of the computer. Second, subsection 2 refers to the tangible, reproduced back-up copy made by the owner for archival purposes. And third, the opening qualifier of section 117 refers to the owner's "copy of a computer program," by which is understood the tangible piece of software, usually on disk, purchased by the user or acquired with the purchase of the computer. To simplify our analysis, this user-owned copy will be referred to as the master copy and the tangibly reproduced copies will be referred to as duplicate copies.

Understanding the Copyright Law

The almost brutal specificity of section 117 has not precluded the differing — even contradictory — legal constructions one expects in applying any law to specific situations or practices, but the law is clear on one point: absent permission from the copyright owner, it is illegal to make duplicate copies of a computer program for distribution to and use by anyone other than the owner of that master copy. Conversely, the *only legally duplicated copy* of the master copy of a piece of software is the one back-up copy made by the owner for archival purposes. This provision was intended to protect software users by ensuring that they will have a working copy of their program if the master copy is damaged or destroyed and must be sent to the manufacturer for repair or replacement.

The obvious rationale for prohibiting the duplication of copies derives from the purpose of copyright protection as expressed in the Constitution: to protect the property interest of creative individuals by "securing for limited time to authors and inventors the exclusive right to their respective writings and discoveries." Congress, however, has been obliged not only to protect the financial and intellectual interests of creative people but also to provide reasonable public access to copyrighted material, especially for the educational purposes of teaching, research and scholarship. Thus, section 106 of the copyright law provides for the exclusive rights of the copyright owner and sections 107 and 117, respectively, provide for "fair use" by educators and for (very) limited copying of computer programs.

While section 117 (2) permits the making of a single back-up copy, it should be emphasized that the law allows only the *owner* of a master copy to make or authorize the duplication of the back-up copy. That eliminates, then, the duplication of one or more copies of a piece of software obtained by rental or loan or for preview purposes, since the user in those cases is not the owner of the master copy. Furthermore, the back-up copy is legal only as an archival copy, not as a working copy to be used by someone else in another computer.

Section 117 (1) describes the only other legal copy of the master copy owned by the user: that copy reproduced, in layman's terms, by inputting the software into the computer in order to utilize the program. Now the response of most laymen to this provision is likely to be amazement that (1) the inputting of a piece of software would be considered the making of a copy and (2) our legislators felt the need to include and protect such an obvious use. The rationale for this seemingly unnecessary provision is at least partially explained by the definition of the word "copy" contained in the copyright law. Section 101 defines "copies" as "material objects . . . in which a work is fixed. . . ." And "[a] work is 'fixed' . . . when its embodiment in a copy . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."

Given these definitions, the authors of the CONTU Report,[1] on which Congress relied heavily in drafting section 117, concluded that the intangible computer program stored in the computer's memory in machine-readable form constitutes a reproduction from the tangible form of the program existing on a disk, tape or microchip. In order for the computer to perform its intended functions, a computer program must be transferred from its tangible form to the computer's memory for processing. Because a program in the memory of some computers can be accessed *and copied* by a user at a connecting terminal, and because it may be repeatedly reproduced or accessed, that intangible copy of a computer program existing in the machine's memory is considered "a copy" of a computer program.

Legal Principles for Assessing Legality of Software Use

Section 117 of the copyright act clearly prohibits the unauthorized duplication of copies of a computer program for distribution and use by others than the owner of the master copy. But it does not directly address a number of other uses of software commonly practiced or at least questioned in the schools: 1) using a single-loading master copy to boot up sequentially two or more microcomputers in a classroom or computer lab; and 2) using a slightly modified master copy in a network of microcomputers, enabling a group of students simultaneously to access that same master copy at their own stations. Educators concerned about the legal use of software in their schools are not, fortunately, dependent solely upon section 117 for delineating the legal parameters of acceptable software use. There are at least five other sources or tests for assessing the legality of the software uses mentioned above.

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[1] National Commission on New Technological Uses of Copyrighted Works, Final Report (Library of Congress 1976).

The Market Effect Test

Perhaps the most basic and reliable test for evaluating the legality of a questionable use of instructional software is the "market effect test." Since an essential function of the copyright law is to protect the financial interests of creative people, a logical question to ask about someone's use of copyrighted material is: "Does this use deprive the copyright owner of rightful profits?" The making and distribution of duplicate copies from a master copy of a computer program not only violates section 117 but fails the market effect test by depriving the copyright owner of profits otherwise earned from the sale of an equivalent number of copies of that program. By the application of this test, furthermore, we begin to see why some of the other educational uses of instructional software are questionable if not illegal. A teacher, for example, who sequentially boots up a dozen microcomputers with one master copy of an instructional program, is making accessible to twelve students simultaneously that one copy — thereby depriving the copyright owner of profits from the sale of eleven additional copies of the program that the school would otherwise have needed to purchase in order to service all twelve students at once. Such use, then, unless authorized by the copyright owner or by accompanying license, fails the market effect test. Likewise, a computer program designed for use in a single microcomputer but modified to run in a network of microcomputers deprives the copyright owner of profits from the sale of the number of copies equivalent to the number of stations being used in the network. The network accessing of a single-user program, then, also fails the market effect test.

The market effect test, conceived in layman's terms, becomes the Golden Rule for Computer Users, attributed to Joseph McDonald: "Take not from others to such an extent and in such a manner that you would be resentful if they so took from you." In other words, trade places with the producer/copyright owner and then ask yourself how you would feel about another individal's use of your program. If you would resent the use in question, it is because you are losing profits, and therefore, that use is certainly questionable and probably illegal.

The Intended Use Test

The second test derived from copyright law is the "intended use test" which complements the market effect test by raising the question of the design of the program and the intention of its designer. This intended use test is especially helpful in resolving questions about the legality of networking computers. Specifically, if the program is *designed* and therefore intended to serve a network, reason dictates that such a use would not violate the copyright law. If, however, the program is designed to be used by a single user at a single microcomputer, and it is modified to serve multiple users in a network, it is not being used as intended — thereby failing the intended use test. The latter example, by the way, has already been shown to fail the market effect test, making its legality doubly suspect.

The Simultaneous/Sequential Users Test

A third test suggested by some legal experts, most notably Daniel Brooks, distinguishes between simultaneous and sequential users.[2] This distinction further sharpens the legal analysis of such practices as networking and sequentially booting up a series of microcomputers with one disk. Essentially, this test renders legally acceptable the use of a master copy by several persons as long as they are accessing the program one at a time and not simultaneously. The rationale for this construction of the copyright law is based on the right of the *owner* of the master copy to do with that program what he or she wishes, as long as no duplicate copies are made (beyond the permissible back-up copy). That means, for example, that the owner of a Wordstar program can loan the copy to any number of individuals — one at a time. In this situation, neither the owner of the program nor the sequential users of the program loaned to them would be considered in violation of the copyright law.

Applying this principle to the school setting, a teacher with one master copy of a piece of instructional software might legally allow twelve students to use that master copy *one at a time* without fear of violating the copyright law — though allowing a dozen students to access that master copy simultaneously through a network or sequentially booting up a dozen microcomputers would constitute a probable copyright infringement. This test and the reasoning on which it is based, however, is not as unassailable as the two previous tests. It is true that the owner of a master copy may legally choose to loan that copy to one or more individuals for temporary use. And on an individual basis, the extent and impact of this practice are so miniscule as to render it inconsequential. But in a classroom setting, the distinction between sequential and simultaneous multiple users begins to blur as we consider its impact. Just how different in effect is the teacher who allows a dozen students to access simultaneously a modified piece of software via a network from a teacher who allows a dozen students to access one at a time his or her master copy of that same program? Both practices result in the very proliferation of users that section 117 was intended to control. In short, the distinction between sequential and simultaneous users is interesting and perhaps helpful but is not likely to produce the most convincing evidence for either prosecutor or defendant if and when a software copyright case involving multiple users comes before the courts.

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[2] See article by Brooks, *Fair Use of Educational Software* in V. Helm, Software Quality and Copyright: Issues in Computer-Assisted Instruction (1984).

The Fair Use Test

The fourth test for assessing the legality of software use in the schools involves the application of the "fair use" concept. Unlike the three previous tests which are legal principles derived secondarily from the nature and function of the copyright law, "fair use" is a concept defined explicitly in section 107 of the Copyright Act. The concept of fair use is intended to balance the interests of copyright owners with the needs of others for access to copyrighted material. Educators are the prime but not the sole beneficiaries of this provision; limited access is made available not only to researchers and teachers but also to media reporters who review, report and comment on copyrighted works. In determining fair use, the following four factors are considered.

1. The *purpose and character* of the use, including whether the copied material will be for nonprofit, educational use or for commercial use; however, the courts have already found absence of financial gain itself insufficient for a finding of fair use.

2. The *nature* of the copyrighted work, with special consideration given to the distinction between a creative work and an informational work. For example, copies made of a newspaper or newsmagazine column merit less protection than copies made of a musical score or a short story. Copies made of material prepared for classroom consumption merit *more* protection than copies prepared for public consumption. At least part of the rationale for this stems from the market effect test. A teacher who photocopies a workbook page or a textbook chapter, for example, is depriving the copyright owner of sale profits in a way that he or she does not deprive a copyright owner of sale profits by the copying of one page from the daily paper.

3. The *amount, substantiality or portion* used in relation to the copyrighted work as a whole. This factor requires consideration less of the number of lines or pages copied than of 1) the proportion of the larger work that is copied and used and 2) the significance of the copied portion. Ten lines copied from a twenty line poem is qualita-

tively different from the reproduction of ten lines from a twenty page story or a 200 page book. And ten lines containing the "essence" of a literary work is regarded differently than ten lines selected and reproduced to illustrate a less significant point.

4. The effect of the use upon the *potential market* for the value of the copyrighted work. This, for many copyright experts, is the most critical factor in determining fair use of computer software and it serves as the basic principle from which the other three factors are derived and to which they are related. If the reproduction of a copyrighted work reduces the potential market and therefore the potential profits of the copyright owner, its fair use is questionable.

Applying these four factors to computer software, the fair use concept actually dashes any hopes educators might have for special privileges in terms of copying instructional software. No matter how altruistic the motivation — making instructional software accessible to large numbers of otherwise deprived students and saving the school district and ultimately the taxpayers "a bundle" — educators will find little support in the fair use provision. The first factor, pertaining to the character and purpose of the use, would be cause for rejoicing if it were the only factor, for most educators wishing to make duplicate copies of software for their students would meet the test of using those copies for educational, nonprofit purposes rather than for direct commercial benefit. However, as mentioned above, even the absence of profit does not in itself protect the person making duplicate copies, and the remaining three factors unequivocably negate the initial advantage this "character and use" factor otherwise appears to provide.

In the case of instructional software, the nature of the copyrighted work is — redundantly — educational rather than merely public. Because it is designed for classroom use and is easily accessible for that use, the copying of educational software is *especially* wrongful as fair use provides the greater protection to material otherwise difficult or impossible to obtain for classroom use.

The amount or portion of the original work that can be legally copied is an even more discouraging consideration for educators hoping that fair use will expand their copyright privileges. One need not be a computer programmer to realize how nearly impossible it is to copy only a portion of a program from a floppy disk or any other medium containing a computer program. And even if it were *possible* to copy only part of a program, the partially copied program would be all but useless anyway. In short, the only likely copying of a master disk involves copying the entire program, thereby failing once again to qualify as fair use.

Finally, the effect of the use upon the potential market is a consideration that clearly renders the copying of instructional software an unfair use, for every copy made and used reduces the potential market accordingly.

Licensing Agreements

If the fair use provision of the copyright act discourages educators who wish to meet the needs of a maximum number of students for a minimum expenditure, there is another source of help — and it also happens to be the one remaining source for determining the legality of specific software use: the license that frequently accompanies a given computer program or set of programs. Such license may be found in manuals or other materials accompanying the disks and usually becomes effective when the packaging is unsealed. Typical of the kind of license defining the legal use of software for individual users/computers is this one from Spinnaker:

> The distribution and sale of this product are intended for the use of the original purchaser only and for use only on the computer system specified. Lawful users of this program are hereby licensed only to read the program from its medium into the memory of a computer for the purpose of executing this program. Copying, duplicating, selling or otherwise distributing this product is hereby expressly forbidden.

Though this license regulates the use of a single program by its owner, increasing numbers of instructional software producers are making available to schools and school districts a variety of licensing agreements. These agreements provide such financially beneficial options as 1) discounts for purchase of multiple copies; 2) permission to duplicate the number of copies required to adequately meet student needs; and 3) software designed for — or permission to modify the software for — use in a computer network. Whatever the license provisions, however, users should understand that any licensing restrictions more stringent than the copyright law itself take precedence over that law which is operative absent licensing provisions.

Penalties for Infringement

Section 504 of title 17 specifies the penalties and remedies for infringement of copyright. In general terms, one who infringes copyright is liable *either* for actual damages and any profits accrued from the illegal copying *or* for statutory damages. The copyright owner has, in fact, two choices of remedies. He or she may elect to recover actual damages (profits lost) and profits earned by the infringer(s). This remedy is an unlikely one if educators are the infringers, however, since in most cases they will have made no profits and the amount of damages will be negligible.

The liability of educators, then, is more likely to be the second option: statutory damages. In this case, the copyright owner may choose one of two alternatives. First, at any time before final judgment is rendered, the copyright owner may agree to accept an award of statutory damages ranging between $250 and $10,000, at the discretion of the court. Second, if the copyright infringer is found to have committed that infringement *willfully,* the court may award the copyright owner up to $50,000 in statutory damages; if, on the other hand, the court finds that the infringer "was not aware and had no reason to believe that his or her acts constituted an infringement of copyright," the court may at its discretion reduce the award of statutory damages to not less than $100.

Implications for Legal Use of Instructional Software in the Schools

Educators tend to react with disbelief and often defiance when first informed of the copyright act and its impact on the potential use of instructional software in the schools. Much of the frustration, of course, arises from what is perceived to be the exhorbitant cost of providing instructional software to all students. Several factors, however, mitigate the otherwise harsh implications of copyright restrictions for the schools.

First, technological advances are making and will continue to make duplication of tangible copies increasingly difficult. Much instructional software now is copy-protected and copiable only by relatively sophisticated computer-users. In their efforts to control a piracy, software producers are developing increasingly sophisticated means of making their products functional only as intended. Second, to the extent that schools move in the direction of networking, software producers will design programs specifically for use in networks — whether networks of microcomputers or networks consisting of one "master" (intelligent) computer connected to multiple "slave" (dumb) terminals. In these networks, educators will either be using network-designed software in compliance with the intended use and market effect tests or they will be able to obtain the appropriate licensing agreement to modify purchased software for use on their networks. Finally, as indicated above, licensing agreements are available or can be negotiated to enable school districts to make instructional software accessible to large numbers of students at a significantly more cost-effective rate than now burdens most schools.

Informed of these and other innovative options, educators in the near future may find these and other options rendering the copyright law less directly restrictive for their needs and uses. Though no less enforceable, the impact of the copyright law will decline in the light of technologically more sophisticated copy-protection devices, more software designed for networking and other school uses, greater amounts of high quality/low cost software by non-profit producers such as the Minnesota Educational Computing Consortium (MECC), and more expansive licensing agreements. Until these conditions become more prevalent, however, it is imperative that educators know and abide by the restrictions placed on the use of instructional software by the copyright law.

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Trends in School Desegregation Litigation and the Financing of Remedial Decrees

Charles B. Vergon

Introduction

In a 1977 case involving the Detroit public schools and the state of Michigan, the United States Supreme Court held that federal courts possess the authority not only to order the implementation of educational program components as part of a desegregation remedy, but also to assess a portion of the cost of such components against the state treasury. This decision in *Milliken v. Bradley* [1] has had a substantial impact on the scope and nature of the remedial regime sought and ordered in subsequent school desegregation cases, and on the method by which associated costs are computed and financed by local, state, and other co-defendants.

In the case of Detroit, the Supreme Court's affirmance of the lower court's order resulted in the adoption and implementation of a comprehensive remedial plan consisting of thirteen educational or desegregation-enabling components, in addition to the reassignment of pupils. In implementing this plan over a ten year period, the school district will ultimately benefit from the infusion of an estimated $60-75 millon of previously unappropriated state funds. This represents the state's 50% share of the cost of four of the thirteen court-mandated components and the construction of two new vocational education centers.[2] During this same period, the local school board will have earmarked and committed an even greater sum of its own resources to the broad program of educational reform and renewal mandated in the court order.

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[1] 433 U.S. 267 (1977).

[2] Estimates of author based on extrapolation of reported data. While this represents a substantial sum, it is important that such costs be viewed from a contextual perspective. In the case of Detroit for instance, the average annualized state contribution of approximately $6 million represents just slightly over one percent of the district's annual operating budget or roughly $27 per student. Naturally it represents an even smaller fraction of the $1.5 billion allocated annually by the state for public elementary and secondary education. Given the propensity for desegregation costs to be politicized, such referents may provide a more meaningful basis for policy analysis than the actual dollar amounts involved.

Since 1977 similarly comprehensive desegregation plans have been ordered and/or analogous claims of responsibility and extra-school district liability advanced in litigation involving a number of other communities. Illustrative of these actions are ones brought by or on behalf of school districts serving Benton Harbor, Buffalo, Cincinnati, Cleveland, Columbus, Indianapolis, St. Louis and Wilmington/New Castle County. The cost of desegregation and educational components mandated in several of these communities has already exceeded on a per annum basis, and will undoubtedly over the course of court-supervised implementation dwarf those incurred in Detroit, resulting in potentially significant strains on the capacity of both state and local school districts to fund their respective shares.[3]

These cases, however, have not only raised questions concerning the financial capacity of the parties, but have also presented a host of difficult factual, legal and public policy issues not expressly resolved by the Supreme Court in *Milliken*. These issues involve: (1) the expanding nature of remedial regimes; (2) the theories and bases of state and local liability upon which the funding of these remedies may be predicated; and finally, (3) the means by which such obligations may be financed and the authority of the court to mandate a particular source or method by which the needed resources are to be marshalled.

Because of the protracted and exceedingly complex nature of much of the desegregation litigation involved, and constraints governing an article of this length, it will only be possible to provide a general survey of selected issues and the manner in which they have been addressed and resolved to date by some of the trial and appellate courts presiding over *Milliken's* progeny. This survey is divided into three sections, one corresponding to each of the major issue constellations: remedies, liabilities, and the marshalling of resources.

Comprehensive Remedial Regimes

With increasing frequency, federal courts are ordering comprehensive remedial regimes in school desegregation cases.[4] These comprehensive plans generally consist of a series of components, each designed to meet a need associated with equalizing educational opportunity in a complex institutional setting. Four major categories of components found in such structured injunctions include pupil reassignment components, remedial educational components, organizational enabling components, and program financing components. Each category of components is briefly described next.

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[3] *See, e.g.*, Liddell v. Board of Educ. of St. Louis, 567 F. Supp. 1037, *aff'd in part and reversed in part*, 731 F.2d 1294 (8th Cir.), *cert. denied*, 105 S. Ct. 82 (1984). (Estimated expenditures for 1983-84 school year ranged from $38 to $100 million; actual expenditures approximated $45 million.) *See generally* Colton, Urban Desegregation Cost (paper presented to the American Educational Research Association, April 1975) and Hoffman, A Study of the Cost of Implementing Desegregation Plans in Sixteen Major Cities in Report of the Ohio General Assembly Joint Committee on School Desegregation (1978).

Pupil reassignment related components are those designed to overcome pupil segregation and the racially-identifiable nature of buildings. They may consist of mandatory reassignment provisions incorporating techniques such as pairing and clustering, or voluntary programs that utilize magnet or specialist schools to permit varying degrees of pupil or parental choice. Irrespective of which of these two basic approaches or combination of them is employed, transportation services are frequently required and thus represent another prevalent pupil reassignment-related component.

Educational components are those designed to enhance the quality of educational programs and provide academic support services to students who have been the victims of past segregation, discrimination and educational inequities. Programs within this component may include ones focusing on remedial reading and communications; pre-school and all-day kindergartens; multicultural and bilingual education; guidance, counseling and testing; co-curricular and cooperative learning experiences; extracurricular activities; and student rights and responsibilities.

Organizational enabling components are those which, although they do not primarily address the enhancement of education, serve to prepare the organization and those affiliated with it for the impending adjustment represented by desegregation. These adjustments may affect organizational structure, institutional policies and a variety of operating procedures. Enabling components frequently include programs designed to enhance staff knowledge, skills and atti-

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4. *See, e.g.*, Morgan v. Kerrigan, 401 F. Supp. 216, *aff'd*, 530 F.2d 401 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976); Evans v. Buchanan, 447 F. Supp. 982, *aff'd*, 582 F.2d 750 (3d Cir. 1978), *cert. denied*, 446 U.S. 923 (1980); Reed v. Rhodes, 455 F. Supp. 569, *aff'd in pertinent part*, 607 F.2d 714 (6th Cir.), *cert. denied*, 445 U.S. 935 (1982); Berry v. School Dist. of Benton Harbor, 515 F. Supp. 344, *aff'd*, 698 F.2d 813 (6th Cir. 1983); United States v. Board of School Comm'rs., 506 F. Supp. 657, *aff'd*, 637 F.2d 1101 (7th Cir.), *cert. denied*, 449 U.S. 838 (1980); and Liddell, *supra* note 3. For commentary treatment on institutional reform, *see* Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1282 (1976); Kirp, *Legalism and Politics in School Desegregation*, Wis. L. Rev. 924 (1981); Note, *Implementing Institutional Reform*, 91 Harv. L. Rev. 428 (1977); H. Kalodner & J. Fishman, Limits of Justice: The Court's Rule in Desegregation (1978) and W. Hawley, Effective School Desegregation (1981).

tudes; prepare and orient students for their reassignment; inform, educate and actively involve parents and community in the desegregation process; and establish mechanisms for the monitoring and evaluation of desegregation implementation, as well as the resolution of disputes that may arise as a result of the desegregation process. In the case of multidistrict plans, one or more components focusing on governance and interdistrict communication and coordination are also commonly incorporated.

Financing Components represent the fourth generic category of provisions found with increasing regularity in remedial decrees. Financing components focus on the cost of implementing the foregoing remedial programs, prescribe the responsibility of the parties and discuss the means by which financing is to be ensured. These components, which are of relatively recent origin, and sometimes viewed as antithetical to the authority and role of the judiciary,[5] compensate for a critical deficiency in earlier educational reform actions. This deficiency has been the failure to provide or facilitate the effective marshalling of resources necessary to carry out the terms of mandated reform. Such financing components may range from simple orders directing that a particular party implement one of the prescribed educational components, without specifying the amount of the obligation or the source from which it is to be satisfied, to exceedingly detailed orders which specify not only the dollar amount of the obligation, but the source from and means by which the necessary revenues are to be provided by the liable party. Naturally, there are a number of intervening forms such financing components may take.

Because such comprehensive orders — with their educational, enabling and financing in addition to reassignment components — represent a radical departure from those narrow and primarily negative injunctions issued at the time of *Brown v. Board of Education of Topeka,*[6] it is important to briefly review the legal history and precedent from which they have grown. In *Brown* the Supreme Court focused its exclusive attention on the fundamental constitutional question of whether state-sanctioned segregation represented a denial of equal protection even though schools serving whites and blacks were equal in terms of tangible factors such as courses and facilities. Having answered that question in the affirmative, the Court in *Brown II* turned its attention to remedy. In doing so, however, the Court refrained from prescribing detailed remedial decrees, instead electing to provide some general directions for lower courts to follow in formulating orders designed to ensure the admittance of blacks to public schools on "a nonracial basis with all deliberate speed." In accomplishing this, equitable principles were to be applied, characterized by practical flexibility and a facility for adjusting public and private needs.[7]

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[5] Questioning the legitimacy and capacity of courts in institutional reform actions generally, *see, e.g.*, Glazer, *Toward an Imperial Judiciary*, 41 Pub. Interest 104 (1975) and D. Horowitz, The Courts and Social Policy (1977).

[6] 347 U.S. 483 (1954).

While the objective was to open formerly white schools to blacks, the Court repeatedly acknowledged that the "[F]ull implementation of these constitutional principles may require the solution of varied local problems" including those associated with factors such as administrative arrangements, the physical conditions of buildings, personnel matters, admissions policies and the revision of local policies and practices that inhibit desegregation. Lower federal courts were also advised to consider "the adequacy of any plans proposed to meet these problems and to effectuate a transition to a racially nondiscriminatory school system." Jurisdiction would be retained during the transition period.[8]

That the transition to a system of public education freed from discrimination would involve more than the opening of formerly white schools to black students became increasingly evident in the late 1960's and early 1970's as the Court mandated the elimination of discrimination "root and branch" from "every facet of school operations — faculty, staff, transportation, extracurricular activities and facilities."[9] The next step in the progression toward more expansive remedial orders came in 1976 when, in the context of the Detroit desegregation case, the Supreme Court upheld the authority of federal district judges to order ancillary relief in the form of educational components designed to remedy the effects of past segregation and assure the success of the current desegregation effort. In doing so, the Court acknowledged that, "Pupil assignment alone does not automatically remedy the impact of previous unlawful educational isolation; the consequences linger on and can be dealt with only by independent measures."[10]

While the Court expressly observed that the district court's order was not a blueprint for other cases, the imprimatur of the Court on an expansive remedial regime and the prospects of a non-school district party assuming a substantial portion of the associated cost, all but drowned out the Court's cautionary admonition. In successive cases at the federal district court level, the *Milliken* regime was proposed and contended for by school district after school district and in some instances by plaintiffs and even the court and its operative experts and masters.

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[7] 349 U.S. 294 (1955).

[8] *Id.* at 300-301.

[9] Green v. New Kent County, 391 U.S. 430, 438 (1968) and Swann v. Charlotte-Mecklenburg, 402 U.S. 1, 19 (1971).

[10] Milliken, 433 U.S. at 287-88.

Nature and Bases of Local and State Liability

Paralleling this expansion of remedial decrees in school desegregation and other institutional reform actions has been the development of new principles and precedents pertaining to governmental liability for constitutional torts and civil rights infringements. These precedents have tended to constrain traditional protections and immunities enjoyed by governmental authorities, making them more accountable for their policies and actions.[11] What governmental authorities represent potential parties in school desegregation actions? On what theory and bases may they be held liable? What is the nature of their financial responsibility? How is the responsibility apportioned among multiple parties?

Governmental Parties and Bases of Liability

As has always been the case, local school boards and educational officials continue to be routinely named as defendants in school desegregation actions in all regions of the county. Upon proper proof of unconstitutional conduct, they are the parties primarily responsible for designing, and implementing an acceptable desegregation plan. Unless other public agencies and officials have significantly contributed to current levels of unlawful segregation, the responsibility for financing the remedial plan also falls exclusively on the local school district. The vast majority of all school desegregation actions fit this model of local school district liability and financial responsibility.

In those jurisdictions where school systems are unified with municipal governments for purposes of appropriations and budgetary approval processes, an array of local, non-school district defendants may also be named as parties.[12] Those local officials most frequently named include the mayor, city council, housing authorities, and, of course, the treasurer. They may be made defendants either for purposes of demonstrating a constitutional violation on their part, or as a necessary party to ensure the adequacy and full implementation of the required remedial plan.

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[11] *See generally, e.g.*, Edelman v. Jordan, 415 U.S. 651 (1974); Wood v. Strickland, 420 U.S. 308 (1975); Milliken v. Bradley, 433 U.S. 267 (1977); Monell v. New York Dept. of Social Servs., 436 U.S. 658 (1978); and Owens v. City of Independence, 446 U.S. 993 (1980).

[12] *E.g.*, Arthur v. Nyquist, 415 F. Supp. 904, *aff'd in pertinent part*, 573 F.2d 134 (2nd Cir.), *cert. denied*, 439 U.S. 860 (1978).

While southern and border states have historically been named as defendants because of their explicit statutes requiring or permitting pupil segregation at the time of *Brown*, it has only been more recently that northern and western states have been accorded similar attention and status in desegregation actions. Today states in all regions of the country are almost equally likely to be named as codefendants in major desegregation suits. This is the result of several factors.

One factor is that plaintiffs have become increasingly cognizant of, and adept at demonstrating, the interrelationship and impact of policies and actions taken at the local, state, and federal level. Secondly, evolving theories of governmental liability in the area of constitutional torts have provided the necessary legal foundation for proceeding against non-school district parties. Finally, the very nature and magnitude of the remedies, the intergovernmental coordination they necessitate, and the prospects that the associated costs may be spread among several parties, have made the naming of states as codefendants common practice.

A variety of state governmental entities and officials have been named in such actions including governors, attorney generals, state boards of education, superintendents of public instruction and treasurers. The designation of state defendants depends in part on which theory of state liability the facts permit and the plaintiffs elect to pursue. While distinguishing these theories and standards may be useful for purposes of conceptual clarity, it should be recognized that liability is frequently predicted on proofs which may be utilized in conjunction with more than one theory and courts that have often relied implicitly, if not explicitly, on multiple theories or bases of liability. Under these theories, the liability of state level entities or officials may be predicated on their *direct actions* which create or perpetuate local segregation; their *indirect actions* which purposefully ratify or acquiesce in the de jure practices of school districts over which they exercise supervisory authority; or their prior adoption of *mandatory indemnification provisions* in their respective state school or revenue codes.

Direct state participation in purposefully segregatory actions has been relatively common, both in the pre-1954 era and more recent times. Examples include: (1) ordering the closure of or discontinuation of state support for any school district which desegregates;[13] (2)

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[13] Griffin v. Prince Edwards County, 377 U.S. 218 (1964).

failing to rescind or affirmatively combat the consequences of pupil segregation statues;[14] (3) enacting governmental or school district consolidation or reorganization statutes which restrict the participation of minority identifiable districts;[15] (4) adopting measures which effectively nullify locally adopted desegregation plans or restructures governmental decision-making to make such plans more difficult to realize;[16] or (5) approving school siting, construction and bonding proposals.[17] Naturally, except where the state defendant has failed to rectify a previously adjudicated constitutional violation, plaintiffs must allege and prove discriminatory intent on the part of the state pursuant to standards established by the Supreme Court in the mid-1970's.[18]

Even when state level agencies and officials are not directly involved in conduct which creates purposeful segregation at the school district level, they may nevertheless be held jointly liable with local authorities under certain circumstances. While courts have generally rejected the application of the theory of vicarious liability in school desegregation and section 1983 civil rights actions,[19] they have not hesitated to hold governmental officials liable for their indirect actions which purposefully and materially contribute to current levels of segregation or discrimination. Thus, under one appellate court's formulation of the applicable standard,[20] a state may be held liable for its indirect participation in segregatory actions of local school officals where it can be demonstrated that the state: (1) possessed actual or constructive knowledge of the potentially unconstitutional conditions in the local school district; (2) purposefully failed to carry out a constitutional or statutorily imposed duty to investigate or ensure compliance with applicable state or federal antidiscrimination laws; and (3) continued to provide funds or otherwise ratified or acquiesced in the unconstitutional actions of the district in question.

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[14] *E.g.*, Adams v. United States, 620 F.2d 1277 (8th Cir.) (enbanc), *cert. denied*, 449 U.S. 826 (1980).

[15] *E.g.*, Evans v. Buchanan, 393 F. Supp. 428 (D. Del. 1975); United States v. Board of School Comm'rs, 456 F. Supp. 183, *aff'd*, 637 F.2d 1101 (7th Cir.), *cert. denied*, 449 U.S. 838 (1980).

[16] *E.g.*, Bradley v. Milliken, 433 F.2d 897 and *reaffirmed*, 484 F.2d 215 (6th Cir. 1973), *rev'd on other grounds*, 418 U.S. 954 (1974).

[17] *Id.*

[18] Keyes v. School District No. 1, 413 U.S. 189 (1973); Washington v. Davis, 426 U.S. 229 (1976) and Arlington Heights v. Metro Housing Develop. Corp., 429 U.S. 252 (1977).

[19] Rizzo v. Goode, 423 U.S. 362 (1976); Monell v. New York Dept. of Social Servs., 436 U.S. 658, 694, n.58 (1978); Arthur v. Nyquist, 573 F.2d 134 (2nd Cir. 1978); Reed v. Rhodes 662 F.2d 1219 (6th Cir.), *cert. denied*, 455 U.S. 1018 (1982); Penick v. Columbus Bd. of Educ., 583 F. 2d 787 (6th Cir. 1978), *cert. denied*, 455 U.S. 1018 (1982); and United States v. Board of School Comm'rs, 573 F.2d 400 (7th Cir.) *cert. denied*, 439 U.S. 824 (1978).

[20] Reed, 662 F.2d 1219 (6th Cir.).

Based primarily if not exclusively on such analyses, the states of Michigan and Ohio have been held liable for unconstitutional conditions found to exist in Kalamazoo and Cleveland and Columbus respectively,[21] although not necessarily in all communities within their jurisdictions.[22] In the case of Cleveland alone, the state has been held liable for in excess of $60 million of remedial programming during a five year period commencing in 1978.[23]

Finally, in a limited number of jurisdictions, a mandatory reimbursement statute may serve to create a de facto standard of strict liability on behalf of the state. In these jurisdictions a state may be held liable for the unconstitutional actions of its local school district agents whether their actions are known, unknown, or even unknowable to the state, and irrespective of whether or not the state has taken any measure countenancing the unconstitutional conduct. Such a measure requiring the state to reimburse local governmental entities for costs incurred in implementing new state and federal legal mandates, including those imposed by court order, was enacted in California in 1973 as part of a tax limitation act.[24] Under its provisions, the state provided the Los Angeles Unified School District $103 million of desegregation support in one recent year.[25]

Under one or a combination of these theories and standards a number of states have been found to be constitutional wrongdoers and therefore liable for all or some portion of the cost of the comprehensive remedial plan ordered by the court. Several states, however, have been found to have conducted themselves in a constitutionally appropriate manner, thereby liberating themselves from any affirmative remedial duties or monetary liability.[26] Massachusetts was not only declared to be free from constitutional infirmity in the conduct of its affairs in relation to the Boston public schools,[27] but was actually awarded monetary relief from the Boston school committee for expenses incurred in monitoring that district's compliance with the federal court order under which it has functioned since

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[21] *See* Reed and Penick, supra note 19 and Oliver v. Board of Educ. of Kalamazoo, 368 F. Supp. 143, *aff'd*, 508 F.2d 178 (6th Cir.), *cert. denied*, 421 U.S. 963 (1975).

[22] *E.g.*, Alexander v. Youngstown Bd. of Educ., 454 F. Supp. 985, *aff'd*, 675 F.2d 787 (6th Cir. 1982).

[23] Calculations of the author based on review of unpublished funding orders.

[24] Cal. Rev. & Tax. Code § 2201 (West Supp. 1984).

[25] Figure attributed to Los Angeles School Attorney Peter James, School Law News, Sept. 9, 1983, at 1.

[26] Arthur, 573 F.2d at 134.

[27] Morgan v. Hennigan, 379 F. Supp. 410, *affd sub nom.*, Morgan v. Kerrigan, 509 F.2d 580 (1st Cir.), *cert. denied*, 421 U.S. 963 (1975).

1974.[28] In finding an inadequate basis for state liability at the time of the initial trial, the federal district court observed that the state had enacted a racial imbalance act, monitored district compliance, required the submission of corrective plans to the state commissioner, instituted state court action against the district, and on occasion withheld over $28 million of state aid to the Boston schools as a means of encouraging compliance with applicable state and federal laws.[29] Even though such measures failed to prove fully effective and negate the need for federal court action, the court found that the state had acted affirmatively and in good faith in fulfillment of its statutory duties.

Seldom has the federal government been named as a primary defendant in a school desegregation action even though plaintiffs have demonstrated the significant impact that various federal policies have had on housing patterns and in turn on local school segregation.[30] The fact that constitutionally-based actions have gone largely unfiled may be explained in part by the federal government's categorical aid program, which between 1971 and 1981 made available on the average of $125 million of financial assistance to newly desegregated school districts.[31] As the result of the enactment of the Educational Consolidation and Improvement Act of 1982,[32] however, this aid program was rolled into the new federal block grant program, effectively reducing by dramatic proportions the amount of financial support available to desegregating urban districts.[33] This development spurred new interest in actions against the federal government including a unique contractually-based suit initiated by the Chicago Board of Education.[34] During the just ended 89th Congress, legislation was enacted reauthorizing categorical federal desegregation aid for magnet school programs.[35]

Nature of Liability in Multi-Party Actions

Federal courts generally apply traditional tort principles in determining the nature of liability, and where appropriate, the apportionment of cost. Thus a party may be declared to be severally or individually liable for the cost of an entire remedial plan or constituent component of the plan where the party is the exclusive or primary constitutional wrongdoer relative to the condition to be corrected. The state is frequently held singularly liable for the entire cost of interdistrict relief, including expenses associated with transfer tuition, pupil aid maintenance, and transportation services.[36]

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[28] Morgan v. McDonough, 554 F. Supp. 169 (D. Mass. 1982).

[29] Morgan, 379 F. Supp. at 476-77.

[30] *See, e.g.*, Liddell, 667 F.2d 643 (8th Cir. 1981).

[31] Emergency School Aid Act, Pub. L. No. 92-318 § 701, 86 Stat. 354. *See, e.g.*, Liddell, 667 F.2d at 654 (upholding district court denial of motion to add United States, as defendant party, in part because of the past and presumed future availability of federal ESAA support).

[32] 20 U.S.C. § 3801.

[33] Kearney, *A Study of Black Grants in Selected States*, 12 Breakthrough 1 (Winter 1984).

[34] United States v. Chicago Bd. of Educ. 554 F. Supp. 912, 567 F. Supp. 272, *aff'd in part and vacated in part*, 717 F.2d 378 (7th Cir. 1983), *on remand*, 588 F. Supp. 132, *vacated and remanded*, No. 84-2406 (7th Cir. filed Sept. 26, 1984).

[35] Pub. L. No. 98-377.

In the case of intradistrict desegregation relief, however, where both the state and local school officials have contributed significantly to the condition to be remedied, both may be held jointly liable and the cost apportioned between the parties according to one of several approaches. Most commonly, the court directs that the costs be shared equally between the parties for the components for which joint liability is found.[37] Alternatively, the court may apportion cost according to some pre-existing statutory formula, requiring the state for instance, to pay a set percent of the cost of transportation for desegregation purposes where the state is already so obligated under state school aid legislation.[38]

Although the equal sharing of cost or apportionment according to statutory formula are most common, on occasion courts adopt another approach, such as apportioning cost according to relative culpability.[39] Because the nature of the tortous conduct and the difficulty of isolating and attributing a measureable consequence to the types of events in question, this approach is seldom employed. Finally, some courts in arriving at a determination regarding the apportionment of cost take into account the relative financial capacity of the parties.[40]

In addition to finding parties liable and apportioning cost among them, the court also determines the duration of the financial obligation. Here again there appears to be no singular approach employed by federal district judges. Some elect to use a fixed term approach, declaring at the outset that court jurisdiction, and by implication the funding obligation of liable parties, shall run for a set number of years and terminate at a date certain unless otherwise ordered by the court.[41] Such an approach is particularly common in actions resolved by consent decrees. Another approach that provides for a reasonable level of objective certainty regarding the financial obligation of the parties is the practice of simply setting a maximum dollar amount which may not be exceeded over the life of the court order.[42]

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[36] *See, e.g.*, Evans v. Buchanan, 447 F. Supp. 982, *aff'd in pertinent part*, 582 F.2d 750 (3d Cir.), *cert. denied*, 446 U.S. 923 (1980); United States v. Board of School Comm'rs, 456 F. Supp. 183, *aff'd*, 677 F.2d 1185 (7th Cir.), *cert. denied*, 459 U.S. 1086 (1980); and Liddell v. Board of Educ. of St. Louis, 491 F. Supp. 351, *aff'd*, 677 F.2d 626, *reaffirmed in pertinent part*, 731 F.2d 1294 (8th Cir.), *cert. denied*, 105 S. Ct. 82 (1984).

[37] *E.g.*, Liddell, 731 F.2d 1294.

[38] *E.g.*, Bradley, 411 F. Supp. 937(6th Cir. 1975); *but see* Board of School Comm'rs, 677 F.2d 1185 (court overrides statutory formula).

[39] Berry, 515 F. Supp. 344.

[40] Evans, 447 F. Supp. 982.

A more prevalent approach, however, is for the court simply to provide that the obligation shall continue until unitary status is attained. More often than not, unitary status is not predefined in the orders of the court and thus it becomes a highly subjective standard which provides little direction to the district regarding what must be accomplished before this desired status is attained, or to the state concerning the duration and probably amount of its exposure.[43]

While such a subjective standard is most common, federal courts occasionally establish objective standards by which the parties may evaluate their progress and ultimately the attainment of unitary status. These objective measures may be input, process or outcome-oriented in nature. For instance, an objective outcome measure might call for the elimination of all racially identifiable schools as determined from an analysis of school demographic data or student attainment of a prescribed level of proficiency on state administered reading and math tests.[44]

Naturally, the method used to determine the duration of the financial obligation of the parties will have a significant bearing not only on the amount of ultimate exposure but also on the extent to which the court and parties can use the standard as a means of directing and concentrating compliance efforts.

The Marshalling of Financial Resources

Remedial orders vary not only in terms of their comprehensiveness and the number and nature of liable parties, but also with respect to the extent to which they dictate the source or manner in which monies are to be secured to fund the mandated programs. This section provides a brief overview of the alternative approaches and provisions employed by federal district judges and guiding principles supplied by reviewing appellate courts.

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[41] *See, e.g.*, United States v. Chicago Bd. of Educ., 554 F. Supp. 912 (N.D. Ill. 1983)(approving settlement agreement with stipulated term of 5 years and mutual promises to identify and provide available resources).

[42] *See, e.g.*, Bronson v. Board of Educ., No. 1-74-205 (S.D. Ohio filed June 22, 1984)(approving agreement obligating state to pay up to $35 million over 7 year period).

[43] *See, e.g.*, Oliver v. Kalamazoo Bd. of Educ., 368 F. Supp. 143 (W.D. Mich. 1973)(initial remedial order) and 640 F.2d 782 and 823 (6th Cir. 1980)(denial of supplemental relief).

[44] Berry, 515 F. Supp. at 386-87.

Some remedial desegregation orders simply mandate the implementation of a prescribed plan of pupil reassignment and ancillary educational and enabling components; remaining silent with respect to the source and manner by which each party is to marshall the fiscal resources necessary to meet their respective obligations. In these cases, judicial reinvolvement may be predicated on a motion of one of the parties to compel enforcement of the prior order or the initiation of contempt proceedings against the noncomplying party. This judicially-constrained approach is the one that has been employed most frequently in desegregation cases.

The first line of defense to such narrow funding orders has historically been for the state to assert sovereign immunity predicated on the 11th Amendment and a violation of federalism principles embodied in the tenth amendment. In recent years, however, it has become well established that sovereign immunity does not bar prospective relief necessary to ensure compliance with constitutional obligations.[45] Similarly, the principles of federalism have been held not to be implicated by such a federal court order enforcing the equal protection clause.[46]

With increasing regularity, however, courts are becoming more involved in structuring the manner in which the necessary resources are marshalled to permit the effectuation of their orders. This is explainable in part by the expanding scope and escalating costs of remedial programs and the growing complexity of the party structure. The presence of multiple defendant parties, each of which may be held liable for one or more facets of an increasingly costly remedial program, inevitably invites more numerous and intense legal contentions. These in turn challenge the patience and restraint of the court that labors under an obligation to ensure the the implementation of a plan that "promises realistically to work and work now," an obligation that may have ripened years earlier in protracted litigation that has been characterized by dilatory tactics on the part of the constitutional wrongdoers. At the same time, as a result of such comprehensive orders the non-school district defendants are frequently confronted with a funding obligation for which there is no statutory authority or legally prescribed means for satisfying. These factors, along with others, have caused courts in some cases to resort to a more active role in managing the marshalling of remedial resources, notwithstanding a host of additional legal issues that such a role engenders.

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[45] Edelman v. Jordan, 415 U.S. 651 (1974) and Milliken v. Bradley, 433 U.S. 267 (1977). *See also Ex parte* Young, 209 U.S. 123 (1908) and Griffin v. Prince Edwards Cty., 377 U.S. 218 (1964). The Equal Educational Opportunity Act of 1974 may also serve as a waiver of immunity as to state education officials. Los Angeles Branch NAACP v. Los Angeles Unified School Dist., 714 F.2d 946 (9th Cir. 1983).

[46] Milliken, 433 U.S. 267.

Thus, rather than remaining silent regarding the means by and sources from which obligations are to be satisfied, courts have included in their orders various approaches to ensure the availability and adequacy of fiscal resources. In some instances courts have simply urged unconstrained fiscal problem solving by the parties; in other situations they have suggested to the parties a range of acceptable alternative courses of fiscally responsible action. Under other circumstances courts have prescribed a particular means by which the parties shall meet their financial obligations. And finally, on occasion, federal courts have themselves exercised extraordinary authority and taken actions usually reserved to other governmental authorities or the public at large. These measures, designed to fund remedial desegregation obligations, have included, with varying degrees of appellate approval: (1) the transfer or escrowing of certain school district funds or revenues;[47] (2) the reinstitution of a previously abolished school tax or the adoption of a new tax rate;[48] and even, (3) the temporary suspension of a state referendum rolling back taxes in an area affected by a court-mandated desegregation plan.[49]

As might be expected, it is in such instances that the issues of state sovereignty, federalism, and local control, as well as separation of powers, are most forcefully joined. Federal courts have frequently acknowledged the limitations imposed on their authority by these principles, particularly where their orders would restructure or materially intrude into the conduct of state and local governmental functions in areas as sensitive as taxation and finances. The narrowly circumscribed nature of federal judicial authority in these areas extends even to situations involving the remediation of unconstitutional segregation. This is illustrated by the stringent standard one district judge imposed on himself as a precondition to establishing even general parameters governing the rate of taxation adequate to support a metropolitan desegregation plan:

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[47] Lidell, 491 F. Supp. 351, *aff'd,* 667 F.2d 643 (8th Cir. 1981) and Reed, 472 F. Supp. 623 (N.D. Ohio 1979).

[48] Griffin, 377 U.S. 218; Evans v. Buchanan, 477 F. Supp. 982, *man. granted,* 582 F.2d 750 (3d Cir. 1978); and United States v. Missouri, 515 F.2d 1365 (8th Cir.), *cert. denied,* 423 U.S. 951 (1975).

[49] Liddell, 567 F. Supp. 1037, *stay denied,* 717 F.2d 1180, *vacated and remanded,* 731 F.2d 1294.

> [A] federal court should not become involved failing a total abdication of responsibility [by the state] over a period of time such that further delay significantly jeopardizes constitutional rights.[50]

Space precludes a review of the several cases that have wrestled with the application of such a standard.[51] It is possible, however, to distill from these cases the nature of the inquiry and perspective employed by the appellate courts in evaluating whether the trial court acted within or outside the bounds of its authority in entering a particular type of funding order. Generally, the reviewing court seeks to ascertain whether the conduct of the trial court is characterized by the controlled exercise of equitable authority in light of the countervailing constitutional interests of the parties. Such controlled exercise of authority is generally illustrated by the trial court's systematic and measured attempt to ascertain and employ the least intrusive form of remedial order necessary to ensure the minimum level of constitutionally required resources. A synthesis of these cases also suggests the following hierarchy of judicial actions, organized from the least to the most intrusive and thus potentially violative of the rights of states and local governmental units to structure their own affairs.

1. Issue an order simply obligating the party(ies) to implement the constitutionally required remedial plan;

2. Stipulate the nature and amount of resources deemed essential to the remedy, leaving the means by which they are acquired to the discretion of the party(ies);

3. Suggest to the party(ies) the alternative, state-sanctioned mechanisms which might be utilized or new ones which might be enacted to generate the needed monies and provide a date by which they must select or create and utilize such a means;

4. Direct that a particular state-sanctioned method be employed and be permitted to operate as is normally prescribed, including electoral approval where provided for by law; or

5. Issue an order modifying or suspending certain provisions of existing state-established financing schemata or creating entire

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[50] Evans, 477 F. Supp. at 1025.

[51] Griffin, 377 U.S. 218; Evans v. Buchanan, 477 F. Supp. 982, *man. granted*, 582 F.2d 750 (3d Cir. 1978); and United States v. Missouri, 515 F.2d 1365 (8th Cir.), *cert. denied*, 423 U.S. 951 (1975).

> new ones in order to assure the availability of the monies necessary to support the implementation of the constitutionally required remedy.

Thus the less intrusive the order and the more methodical the trial court's approach in moving to increasingly intrusive measures, the more likely the order will be sustained on appeal. Naturally, in applying such a standard of review, the appellate court may also take into account factors such as the seriousness of the condition to be remedied, the time which has already lapsed since the finding of a violation, the cooperation and past performance of the parties, and the expected duration of the extraordinary judicial action.

Conclusion

The contemporary remedial regime in school desegregation cases differs substantially from the largely negative injunctions issued in the immediate aftermath of *Brown*. In the intervening years since the Supreme Court set down its initial remedial guidelines, federal district judges have crafted increasingly detailed orders imposing broader and more affirmative duties on local school district defendants. With increasing frequency, particularly since the Supreme Court's decision in *Milliken*, federal courts have ordered comprehensive remedial plans incorporating a broad array of remedial educational programs and organizational enabling components, as well as the more traditional pupil reassignment provisions.

Paralleling this expansion of remedial decrees in school desegregation and other institutional reform actions has been the development of new principles and precedents pertaining to governmental liability for constitutional torts and civil rights infringements. These precedents have tended to tear away, at least partially, some of the traditional protections and immunities enjoyed by governmental authorities, making them more accountable for their policies and actions.

These two developments — the expansion of the remedial regime and the erosion of governmental immunities — converged for the first time in *Milliken* and set the state for a new genre of school desegregation actions. These actions concern themselves as much with educational and organizational considerations as with the question of pupil reassignment. They also focus public along with judicial attention not only on which governmental authorities are liable, but also on the means by which necessary resources are to be marshalled and the bounds of judicial authority in making such determinations.

To date, states have been the primary targets of such actions as plaintiffs and local boards of education seek to diversify the party structure in order to spread the remedial costs more broadly. Based on their indirect as well as direct actions that contribute to purposeful segregation at the local school district level, state agencies and officials in just four states have been held liable for over $275,000,000 of prospective desegregation relief in recent years, excluding the nearly $100,000,000 incurred in a single year by another state under terms of a mandatory reimbursement statute.

Even though comprehensive remedial plans are taking hold and favorable theories of governmental liability are evolving to provide a broader base for their financing, the federal judiciary must nevertheless function within the bounds of equitable authority. The case law reflects the constrained nature of federal judicial authority to do more than order the implementation of a remedial plan and determine the liability of the respective parties. Only under carefully circumscribed conditions may the court proceed to dictate the source from or manner by which each party must meet its financial obligation. In this context, the controlled exercise of equitable authority is characterized by the trial court's systematic and measured attempt to ascertain and employ the least intrusive form of remedial funding orders necessary to ensure the minimum level of constitutionally required resources. A hierarchy of judicial actions organized according to their intrusiveness is also synthesized from the case law.

The implications of this evolving genre of desegregation actions are at once clear in some respects and unclear in others. Undoubtedly, future actions will continue to seek broad relief and involve multiple defendants in an attempt to provide an adequate fiscal foundation for plan implementation. More time is necessary, however, to determine the implications of these developments.

Will these comprehensive plans provide more effective and durable remedies? Will they serve as catalysts for educational reform and renewal in the affected school districts? Will states already held liable for substantial desegregation costs move promptly to adopt new monitoring, compliance and enforcement procedures to avert similar exposure in the future? Will other states take proactive measures to prevent the federal judiciary from establishing and administering ad hoc and uncapped desegregation aid programs funded with monies from their state's treasury? Will the federal government be named with increasing frequency as a defendant party and be made to bear the cost of undoing school segregation and related conditions attributable to segregatory public housing and loan policies which originated in Washington? Or do these plans, with their emphasis on educational quality rather than equality, represent a return to the policy of separate but equal in an increasingly segregated system of public education? These are some of the issues which can be expected to receive increasing attention in this evolving area of law and policy.

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Construction Management for Educational Facilities: Professional Services' Procurement and Competitive Bid Statutes

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R. Craig Wood

Public school administrators are under increasing pressure to construct and renovate their facilities in the most timely and cost-effective manner. As project funding is often limited by a variety of constraints, educators have begun to examine alternative construction procurement techniques. One such method, construction management (CM), is being used with varying degrees of success by school districts throughout the country.

Briefly, CM is utilized when a school district engages a firm to coordinate a total project with the objective of representing the district's best interests. CM, developed as an alternative to the traditional public building process, seeks to save an owner time and cost primarily through better contractor coordination and project management. These services may include the planning and design phases of the project as well as the actual construction of the facility.

The CM firm is responsible for exercising highly-skilled professional judgment and possessing technical expertise in areas such as: 1) material design and selection, 2) cost estimates and budgets, 3) schedules and coordination, 4) supervision of construction, and 5) certification of contractor payments. The typical contractual relationship between the school board and the CM firm is similar to that with the architect/engineer. The board then makes awards to multiple prime contractors under competitive bid rules.

CM minimizes or eliminates the use of a general contractor in administering the separate multiple contracts. Under such an arrangement, the CM firm receives a professional fee from the school district. During a project's design and construction phases the CM

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firm performs certain services that are similar to traditional architectural services along with the work of the resident architect's representatives. These CM services often include coordination of architects and engineers, contract administration, payment control, and reporting to the district.

Numerous cases have upheld the practice of contracting with architects and engineers outside public bid observances.[1] Where one is "highly and technically skilled in a science or profession it would be poor judgment to bid where the lowest bidder might also be the least capable and most inexperienced." [2]

As a general rule, contracts for personal or professional services by a public body with a private firm or individual are not governed by public competitive bidding laws and need not be submitted for public competitive bids.[3] The Indiana court of appeals examined CM for schools in *Attlin Construction, Inc. v. Muncie Community Schools,*[4] and concluded:

> [I]ts rationale is that competitive bidding laws are applicable to public works construction contracts only where the material and work must conform to specifications allowing the performance of the contract to be measured by relatively objective standards. Consequently, it is presumed that the legislature intended the lowest price to be the ultimate determining factor in awarding the contract. However, with the public contracts calling for professional and/or personal services requiring aesthetic, business or technical judgment, and/or professional or scientific skills and experiences, it is assumed that the legislature could not have intended the lowest price to be the ultimate determining factor as the performance of the contract can not [sic] be evaluated objectively. Because the nature of personal and/or professional service contracts makes it unlikely that bids would provide any advantage to the public body in awarding the contract, advertising for such bids would be undesirable, impossible or impractical.[5]
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> We do not believe the Legislature contemplated that our bidding statute would govern contracts for professional services . . . similar to those of an architect or engineer . . . . These contracts are not susceptible to objective evaluation of their performance so as to make the price the ultimate determining factor. Furthermore, the nature of such contracts makes advertisement for bids impractical

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[1] Annot., 15 A.L.R.3d 733 (1967).
[2] Cobb v. Pasadena City Bd. of Educ., 285 P.2d 41 (Cal. Ct. App. 1955).
[3] Annot., 15 A.L.R.3d 733 (1967).
[4] 413 N.E.2d 281 (Ind. Ct. App. 1980).
[5] *Id.* at 287.

> and undesirable. Where, as here, a contract requires the construction manager to perform duties similar to that of an architect or engineer, the rationale for exempting the architect or engineer's contract from the bidding laws is equally applicable to the construction manager's contract.[6]

It is important to understand that the nature of the CM contract may influence the courts. In *City of Inglewood-Los Angeles County Civic Center Authority v. Superior Court*,[7] the California Supreme Court ruled that a CM arrangement was not exempt from the state's competitive bid procedures. *City of Inglewood* can be distinguished from *Attlin*. In *City of Inglewood* the CM contract provided that the CM firm guarantee the maximum price of the construction project. The court in *Attlin* noted that the *City of Inglewood* arrangement was "closely akin to the traditional lump sum general construction contract rather than to a contract for the services of an engineer or an architect. Consequently, the management contract could be evaluated by objective criteria making the price the ultimate determining factor."[8]

Generally, school districts are authorized under statute to construct educational facilities by awarding a contract to the firm with the lowest and best bid. The public welfare is then arguably protected in having one entity responsible for construction of the facility at the lowest possible cost to the public. This could suggest that CM does not protect the public well-being in that it is "a number of separate tradesmen performing separate tasks . . . . " The CM method " . . . will not ensure completion of any project. Neither will it ensure completion at a specified contract price."[9]

Because states must protect the health, safety, and welfare of their citizens in general, and school children in particular, only licensed professionals may design public school facilities. Designing a facility for another, or the furnishing of plans and specifications for a facility, constitutes the practice of architecture (or engineering) and requires an architect's (or engineer's) license. However, it is generally held that the supervision of the actual construction of a facility is not, of itself, the practice of architecture and hence no such license is required.[10]

Yet the practice of construction supervision is considered by some states to be the practice of architecture and/or engineering.[11] Supervision of construction obviously requires discretion in the exercise of expertise and professional judgment and closely resembles those professional services. However, if strictly confined to supervision and not design, no architectural or engineering license would be required unless so stipulated by statute.

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[6] *Id.* at 290.

[7] 500 P.2d 601 (Cal. 1972).

[8] Attlin, 413 N.E.2d at 291.

[9] *Id.* at 292.

[10] Annot., 82 A.L.R.2d 1013 (1962).

When competitive bid and professional procurement statutes are silent as to CM, school districts are left to rule-making by state agencies and interpretation by state courts. As a few already do, state legislatures may specifically authorize CM as an acceptable contractual arrangement. Undoubtedly, though, emerging construction techniques such as CM were not contemplated with the passage of many bid statutes.

Construction Management Authorized

Indiana specifically allows school corporations to engage CM firms without public bid. As discussed above, in *Attlin* the state court of appeals considered whether a public school corporation under the bid statutes was authorized to let a contract for CM services.[12] The court's majority found that CM services were very similar to architectural and engineering services.[13]

The strong dissenting opinion questioned the majority's threshold assumption: "That is whether the school corporation can legally enter into a contract with a construction manager."[14]

> "Construction managers" are not named and neither may such be implied. Thus the school corporation may not employ one or contract with one. Had the General Assembly wished to grant school corporations the power to contract for such services it could easily have done so. The omission is indicative of its desire not to do so.[15]

California's Attorney General issued a 1974 opinion specifically authorizing a community college district to secure through noncompetitive means CM services.[16] The Attorney General's opinion relied on the following statutory guidance:

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[11] See, e.g., *infra* note 115.

[12] Attlin, 413 N.E.2d at 282.

[13] *Id.* at 291.

[14] *Id.*

[15] *Id.* at 292.

[16] 57 Op. Att'y Gen. 417 (1974).

> The legislative body of any public or municipal corporation or district may contract with and employ any persons for the furnishing to the corporation or district special services and advice in financial, economic, accounting, engineering, legal, or administrative matters if such persons are specially trained and experienced and competent to perform the special services required.[17]

The opinion also relied on *Cobb v. Pasadena City Board of Education*,[18] wherein the state court of appeal allowed the contracting for "special services" not subject to competitive bids.[19] The opinion distinguished *Cobb* from *City of Inglewood*[20] in which the CM contract included a "guarantee of the outside price" for the project.[21] The Attorney General noted: "Under the District's plan . . . each subcontractor in a particular trade or area of expertise will bid on his part of the job directly to the District, just as if he were a general contractor submitting a bid to the District. We do not find anything legally improper with such a plan."[22]

In a separate but related opinion, the Attorney General stated that "a construction manager need not be licensed as a contractor or as an architect."[23]

Iowa allows school districts to engage CM firms without public bid under a ten-year-old Attorney General's opinion.[24] The Attorney General noted, "The power to employ someone other than an architect to superintend the construction of a school house has been recognized in this state for some time."[25] The Attorney General clearly stated, "Although there appears to be no specific authority authorizing the school district to employ a construction manager under a Construction Management Agreement using multiple contracts for the work to be accomplished, the power to do so may be fairly implied."[26] Recognizing the concept of multiple prime contracts awarded to the lowest bidders, the Attorney General found "[T]here is no prohibition in the statutes or otherwise, against letting bids for specific parts of the construction at different times as the building progresses."[27]

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[17] Cal. Gov't Code § 53060 (West Supp. 1984).
[18] 285 P.2d 41 (Cal. Ct. App. 1955).
[19] *Id.* at 44.
[20] 500 P.2d 601 (Cal. 1972).
[21] *Id.* at 604.
[22] 57 Op. Att'y Gen. at 419.
[23] 57 Op. Att'y Gen. 421 (1974).
[24] Op. Att'y Gen. No. 74-5-15 (1974).
[25] *Id.* at 532.
[26] *Id.* at 531.
[27] *Id.* at 532.

By virtue of an Attorney General's opinion, CM for schools is specifically allowed in Maryland.[28] If the CM firm is selected via a competitive bid process the contract is acceptable.[29] However:

> When it is not possible or feasible to prepare specifications or when such specifications ... would not support competition by sealed bids, it follows that the statutory requirement must, of necessity, be discarded .... [T]he Board of Education would nevertheless be duty-bound to adhere to its intent .... [A]t a minimum, this should include:
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> 1. Public notice of the requirement for construction management services designed to reach the audience of potential offerors;
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> 2. Providing to known potential offerors an explicit description of the services sought, minimum contractual requirements, and the criteria which will be employed as the basis of selection so that all offerors may compete on the same basis; and
>
> 3. Providing an adequate time within which offerors may submit their responses or proposals.[30]

Regarding the question of whether the CM firm could perform construction work itself, the Attorney General realized:

> [I]t would be improper to entertain bids from the construction manager or its affiliates for construction work on the project. In the context of its role as advisor to and agent of the school board, the construction manager becomes a de facto arm of the board, to whom it owes sole allegiance. To permit it to function as a construction contractor while at the same time charging it with the responsibility of monitoring performance and advising the school board with respect to such matters as compliance with specifications and the need for change orders is to create a situation fraught with conflicting interests. ... [S]uch a situation is to be avoided.[31]

Nevada's Local Government Purchasing Act,[32] which applies to school districts,[33] requires that contracts for the construction of public buildings be awarded to the lowest responsible bidder.[34] Contracts for professional services are exempt from the competitive bid requirement.[35] The Nevada Attorney General has issued an opinion that states:

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[28] 63 Op. Att'y Gen. 549 (1978).

[29] *Id.* at 553.

[30] *Id.* at 554.

[31] *Id.* at 556.

[32] Nev. Rev. Stat. ch. 332 (1983).

> County hospitals and other local government entities otherwise authorized by law to engage in public works projects may utilize construction management services for such projects and under NRS 332.115, which exempts contracts for professional services from competitive bidding requirements, contracts for construction management services need not be let by competitive bidding if a construction manager is used solely for consulting or coordinating purposes, but must be so let if the manager is made responsible for guaranteeing cost and construction of the project.[36]

Texas statutory law provides for competitive bidding for all school construction projects of $5,000 or more.[37] The statute excludes fees for "professional services rendered, including but not limited to architects' fees . . . ."[38] The Texas Professional Services Procurement Act[39] states:

> For purposes of this Act the term "professional services" shall mean those within the scope of the practice of . . . architecture . . . or professional engineering . . . or those performed by any licensed architect . . . or professional engineer in connection with his professional employment or practice.
>
> No state agency, political subdivision, county, municipality, district authority or publicly owned utility . . . shall make any contract for, or engage the professional services of . . . [an] architect . . . or registered engineer, or any group or association thereof, selected on the basis of competitive bids submitted for such contract or for such services to be performed, but shall select and award such contracts and engage such services on the basis of demonstrated competence and qualifications for the type of pro-

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[33] *Id.* at § 332.015.
[34] *Id.* at § 332.065.
[35] *Id.* at § 332.115.
[36] Op. Att'y Gen. No. 209 (1977).
[37] Tex. Educ. Code Ann. § 21.901 (Vernon 1984).
[38] *Id.*
[39] Tex. Rev. Civ. Stat. Ann. art. 664-4 (Vernon Supp. 1984)

> fessional services to be performed and at fair and reasonable prices, as long as professional fees are consistent with and not higher than the published recommended practices and fees of the various applicable professional associations and do not exceed the maximum provided by any state law.[40]

The central question is whether CM constitutes professional services under Texas statutes. The Texas Attorney General issued an opinion that CM services were "personal,"[41] but did not address whether such services were "professional."[42] Commentators have argued that CM for schools would be upheld,[43] since Texas courts allow school districts broad discretion absent clear abuse.[44]

Alaska's education code authorizes CM for schools.[45] When state funds are appropriated for construction, fees for CM services are limited to 2% for an appropriation of $5 million or more, 3% for an appropriation between $500,000 and $5 million, and 4% for an appropriation of $500,000 or less.[46]

Colorado's 1981 Procurement Code[47] calls for the executive director of the state's department of administration to "promulgate rules providing for as many alternative methods of construction contracting management as feasible."[48] All political subdivisions, including school districts, are authorized to adopt all or any part of the code and its accompanying rules.[49] Procurement of such professional service is by competitive sealed proposal.[50]

Under Florida's Educational Facilities Act of 1981,[51] the state office of educational facilities construction "shall require [school district] boards to employ procedures for the design and construction of new facilities, or major additions to existing facilities, that will include, but not be limited to, the latest developments in construction."[52] Included is:

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[40] *Id.*

[41] Op. Att'y Gen. No. MW-530 (1983).

[42] *Id.*

[43] Cooper & Horton, *Competitive Bid Requirements for School District Contracts*, Tex. B.J. (Oct. 1983) at 1154.

[44] *Id.* at 1156.

[45] Alaska Stat. § 14.11.020(a) (Supp. 1984).

[46] *Id.* at § 14.11.020(c).

[47] Colo. Rev. Stat. § 24-101 thru § 24-112 (Supp. 1984).

[48] *Id.* at § 24-105-101.

[49] *Id.* at § 24-101-105(2).

[50] *Id.* at § 24-103-203(1).

[51] Fla. Stat. Ann. ch. 235 (West Supp. 1984).

[52] *Id.* at § 235.211(2).

> Construction management — A process whereby a single or highly coordinated authority is responsible for all scheduling and coordination in both design and construction phases and is generally responsible for the successful, timely, and economical completion of the construction project.[53]

Under the Massachusetts state finance code,[54] CM is considered a recommended mode of procurement.[55] Its public building construction code,[56] which applies to school districts,[57] sets forth CM selection procedures.[58] Its public works construction code[59] calls for separate specifications for 18 classes of work, including plumbing, HVAC, and electrical.[60]

South Carolina's 1981 Consolidated Procurement Code,[61] which requires all political subdivisions to have adopted comparable procedures by 1983,[62] specifically recognizes CM for state agencies:

> "Construction management services" are those professional services associated with a system in which the using agency directly contracts with a professional construction manager to provide that group of management activities required to plan, schedule, coordinate, and manage the design and construction of a state project in a manner that contributes to the control of time, cost, and quality of construction as specified in the construction management contract.[63]

> It is the policy of this State to announce publicly all requirements for . . . construction management . . . services and to negotiate contracts for such services on the basis of demonstrated competence and qualification for the particular type of services required, and at fair and reasonable prices.[64]

The Utah procurement code applies to "local procurement units," including school districts,[65] in the selection of "their agent or construction manager."[66] State rules and regulations must "provide for as many alternative methods of construction contracting management as determined to be feasible. These rules and regulations shall:"[67]

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[53] *Id.*
[54] Mass. Ann. Laws ch. 29 (Michie/Law. Co-op. 1983).
[55] *Id.* at § 7E.
[56] *Id.* at ch. 7 §§ 30B-P.
[57] *Id.* at § 30B.
[58] *Id.* at § 30L.
[59] *Id.* at ch. 149 §§ 44A-I.
[60] *Id.* at § 44F.
[61] S.C. Code Ann. tit. 11 ch. 35 (Law. Co-op. 1983).
[62] *Id.* at § 11-35-50.
[63] *Id.* at § 11-35-2910(3).
[64] *Id.* at § 11-35-3210(2).

> (1) Set forth criteria to be used in determining which method of construction contracting management is to be used for a particular project;
>
> (2) Grant to the chief procurement officer or the head of the purchasing agency responsible for carrying out the construction project the discretion to select the appropriate method of construction contracting management for a particular project; and
>
> (3) Require the procurement officer to execute and include in the contract file a written statement setting forth the facts which led to the selection of a particular method of construction contracting management for each project.[68]

Virginia statute calls for competitive bidding on all school construction contracts if any state funds are involved.[69] To the extent adopted by school authorities through their procurement rules,[70] Virginia's 1982 Public Procurement Act[71] specifically permits CM to "coordinate and administer contracts for construction services for the benefit of the owner, and may also include, if provided in the contract, the furnishing of construction services to the owner."[72] Procurement of CM services is done by competitive negotiation:[73]

> Selection shall be made of two or more offerors deemed to be fully qualified and best suited among those submitting proposals, on the basis of the factors involved in the request for proposal, including price if so stated in the request for proposal. Negotiations shall then be conducted with each of the offerors so selected. Price shall be considered, but need not be the sole determining factor. After

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[65] Utah Code Ann. §§ 63-56-2,-5 (Supp. 1983).
[66] *Id.* at § 63-56-35.5.
[67] *Id.* at § 63-56-36.
[68] *Id.*
[69] Va. Code § 11-41.1 (Supp. 1984).
[70] *Id.* at § 11-35D.
[71] *Id.* at § 11-35.
[72] *Id.* at § 11-37.
[73] *Id.*

> negotiations have been conducted with each offeror so selected, the public body shall select the offeror which, in its opinion, has made the best proposal, and shall award the contract to that offeror. Should the public body determine in writing and in its sole discretion that only one offeror is fully qualified, or that one offeror is clearly more highly qualified than the others under consideration, a contract may be negotiated and awarded to that offeror.[74]

It is interesting to note that CM services may include actual construction under Virginia law, contrary to the logic expressed by other states.

Construction Management Apparently Authorized

Oregon statute requires that all public contracts be let via competitive bid procedures.[75] The exception to this requirement can be found in the provision allowing the awarding of contracts for personal services.[76] In *Mongiovi v. Doerner,*[77] the state court of appeals allowed a county to retain a CM firm without public bid. "[T]here was no general contractor under the construction method used (called 'fast track')." As one witness explained:

> Well, it's not feasible to build on a fast track schedule without a construction manager because by definition under fast track you are not putting out a general contract .... [T]here is no general contractor who is responsible for all of the work under fast track because you put out the frame, you may put out the excavation separately, you put out the curtain wall or the exterior walls of the building, you put out one or more contracts for the interior finishes of the building, you put out a contract for the mechanical aspects of the building, the electrical aspects of the building, and all of these go out as ... separate contracts many of them at different times, and there's nobody except a construction manager who could tie that package together, so [the] fast track approach is not feasible without a construction manager there.[78]

The court went on to stress that the CM firm did not perform any construction. It was a party to a personal service contract "whereby the county was purchasing professional services involving peculiar skills, knowledge and expertise. [The firm] was selected on the basis of [its] qualifications and prior experience."[79] Hence, the court ruled that the CM contract was "exempt from the statutory bidding and bonding requirements."[80] Because all political subdivisions are included in the statutory definition of "public agency,"[81] CM is likely allowed for Oregon schools.

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[74] *Id.*

[75] Or. Rev. Stat. § 279.015 (1983).

[76] *Id.* at § 279.051.

[77] 546 P.2d 1110 (Or. Ct. App. 1976).

[78] *Id.* at 1113.

A Pennsylvania statute and case apparently authorize CM for schools. Its education code requires separate bids for plumbing, HVAC, and lighting work on school construction projects.[82] In *Willman v. Children's Hospital of Pittsburgh,*[83] the commonwealth court endorsed CM for a county hospital project where "all trade or construction contracts were to be managed and executed by" the construction manager.[84] The same Municipal Authorities Act cited which authorized the county hospial authority also authorizes public school building authorities.[85]

The New York State Comptroller has ruled that "a municipality may enter into a contract to engage a construction management firm for . . . coordination of a public works project . . . and such a contract would be free from competitive bid requirements as the services involved contain the elements of professional services."[86] New York's general municipal law, which includes school districts in its coverage,[87] requires separate specifications, bids, and awards for plumbing, HVAC, and electrical work on all construction.[88]

Alabama's public contracts code pertains to school districts.[89] Its competitive bidding requirements do not apply to "contracts for the securing of services of . . . architects, . . . superintendents of construction, . . . engineers, . . . or other individuals possessing a high degree of professional skill."[90] Because employment contracts are covered elsewhere,[91] a superintendent in Alabama appears to be more a construction manager than an employed clerk of the works.

Delaware's state government code on public works contracts is expressly made applicable to school districts.[92] Under statute, a district "may retain the services of a general contractor, or other qualified person, firm or corporation to assist in cost estimation, economic design analysis and construction . . . ."[93] These are some of the functions performed by a construction manager, without using the terminology.

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[79] *Id.*
[80] *Id.*
[81] Or. Rev. Stat. § 279.011.
[82] Pa. Stat. Ann. tit. 24 § 7-751(a) (Purdon Supp. 1984-85).
[83] 459 A.2d 855 (Pa. Commw. Ct. 1983).
[84] *Id.* at 857.
[85] See *supra* note 82 at tit. 53 § 306(A).
[86] N.Y. Op. State Compt. 80-5 (1980).
[87] N.Y. Gen. Mun. Law § 100(1) (McKinney Supp. 1983-84).
[88] *Id.* at §§ 101(1), (2).
[89] Ala. Code § 41-16-50(a)(1) (Supp. 1984).
[90] *Id.* at § 41-16-51(a)(3).
[91] *Id.* at § 41-16-51(a)(4).

Illinois defines the practice of architecture to include "professional services such as . . . construction management . . . in connection with the construction of any . . . public buildings."[94] Under its local government code, public hearing commissions have the power to employ architects and "construction" experts.[95] School districts are included in this coverage.[96] School contracts for professional services are exempted from competitive bid statutes.[97] In *Gastaldi v. Reutermann,*[98] a state appellate court recognized thirty years ago that owners (such as school districts) could hire superintendents of construction who are not architects "for day to day, perhaps hour to hour, supervision of the construction which is separate and distinct from the architect's service."[99] If the architecture statute is taken literally, though, it would allow CM for Illinois schools only if performed by licensed architects.

New Jersey statutes seem to permit such activities as CM by licensed architects and engineers. "Professional services," not subject to competitive bidding,[100] are defined as:

> [S]ervices rendered or performed by a person authorized by law to practice a recognized profession and whose practice is regulated by law and the performance of which services requires knowledge of an advanced type in a field of learning acquired by a prolonged formal course of specialized instruction and study as distinguished from general academic instruction or apprenticeship and training.[101]

New Jersey's public schools contracts law generally requires separate plumbing, HVAC, electrical, structural steel, and other construction contracts.[102]

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[92] Del. Code Ann. tit. 29 § 6901(1) (Supp. 1983).
[93] *Id.* at § 6903(f).
[94] Ill. Ann. Stat. ch. 111 § 1204 (Smith-Hurd Supp. 1983).
[95] *Id.* at ch. 85 § 1044(g).
[96] *Id.* at § 1033(e).
[97] *Id.* at ch. 122 § 10-20.21, § 34-21.3.
[98] 104 N.E.2d 115 (Ill. App. Ct. 1952).
[99] *Id.* at 117.
[100] N.J. Stat. Ann. § 18:18A-5(a)(1) (West 1984).
[101] *Id.* at § 18A:18A-2(h).

New Mexico's 1984 Procurement Code[103] calls for the contracting of professional services by all political subdivisions of the state [104] according to competitive sealed proposals. [105] These services include architectural, engineering, management analysis, and similar services.[106] CM for schools may be reasonably implied from the statutory language as an architectural/engineering service.[107]

Combining statutes which never specifically mention CM, North Carolina apparently authorizes CM for schools. Licensed architects, engineers, and general contractors may "administer [building] construction contracts."[108] School and other public building contracts must permit separate bids for HVAC, plumbing, electrical, general, and other appropriate work.[109]

Ohio specifically allows CM for counties by statute:

> In connection with the planning and construction of any public building project, the board may employ a construction project manager or consultant, and fix their compensation. Such construction project manager or consultant shall be expert and qualified in their respective fields.[110]

Ohio's public improvements law[111] requires separate bids for separate classes of work on school construction projects.[112] Thus CM for Ohio schools is implied.

Tennessee statutory language apparently allows CM for schools under a non-competitive bid process by architects and engineers:[113]

> Contracts by counties, cities, metropolitan governments, towns, utility districts and other municipal and public corporations of this state for . . . services by professional persons or groups of high ethical standards, shall not be based on competitive bids, but shall

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[102] *Id.* at § 18A:18A-18.
[103] N.M. Stat. Ann. § 13-1-1 thru § 13-1-172 (Supp. 1984).
[104] *Id.* at § 13-1-67.
[105] *Id.* at § 13-1-122.
[106] *Id.* at § 13-1-76.
[107] *Id.* at §§ 13-1-31,-55.
[108] N.C. Gen. Stat. § 83A-13(b) (Supp. 1983).
[109] *Id.* at § 143-128.
[110] Ohio Rev. Code Ann. § 153.31 (Page 1984).
[111] *Id.* at ch. 153.
[112] *Id.* at § 153.50.
[113] Tenn. Code Ann. § 62-6-102 (1980).

be awarded on the basis of recognized competence and integrity.[114]

In Wisconsin, a fifty-year-old state supreme court decision confuses already imperfect statutory language which apparently authorizes CM for schools. The definitions of architects and engineers include the "responsible supervision of construction."[115] School boards may contract with architects and engineers.[116] Wisconsin's municipality law, which includes school districts,[117] calls for separate plumbing, HVAC, and electrical contracts on public works.[118] That separation of work, coupled with the above definitions, seems to allow CM by licensed architects and engineers. Yet the state supreme court, in *Wahlstrom v. Hill,*[119] carefully distinguised "responsible supervision of construction" by architects and non-architects:

> The statute refers to the sort of supervision which an architect ordinarily gives. It cannot be construed to forbid all supervision except by a licensed architect. Every superintendent and foreman, and, in the main, every workman, must of necessity do his work in such a manner as to conform to the plans and specifications. The supervision that is necessary to performance is not the supervision that is ordinarily rendered by an architect. What the architect does is to ascertain whether the work has been done as planned. There is of necessity supervision of a sort which precedes that of the architect. The architect is responsible for seeing that the plans and specifications are carried out, not for the method by which the final result is achieved, unless the method adopted is one which will not permit of the result intended.[120]

Construction Management Not Authorized

Only Arizona has an Attorney General's opinion specifically prohibiting the use of CM for schools:

> [The] school district's proposal to use a construction management, rather than a general contractor, plan in the construction of school buildings would not comply with statutory requirements that there be a single responsible contractor and performance and pay-

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[114] *Id.* at § 12-4-106.
[115] Wis. Stat. Ann. § 443.01 (West Supp. 1983).
[116] *Id.* at § 120.13(9).
[117] *Id.* at § 66.29(1)(a).
[118] *Id.* at § 66.29(1)(b).
[119] 252 N.W. 339 (Wis. 1934).
[120] *Id.* at 341.

> ment bonds in amounts equal to the full contract amount ....[121]

The Attorney General reinforced its opinion with one in 1983 which puts Arizona contrary to many states described above. Noting that the state's public buildings and improvements code[122] applied to school districts, the Attorney General stated that using multiple prime contractors "contravenes" the requirement for a single general contractor.[123]

Construction Management Not Addressed

CM for schools is not addressed by statute, case law, or attorney general opinion in Arkansas, Connecticut, District of Columbia, Georgia, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Oklahoma, Rhode Island, South Dakota, Vermont, Washington, West Virginia, or Wyoming.[124]

Maine's public improvements code, which applies to school construction,[125] includes the traditional description of an employed clerk of the works:

> A clerk-of-the-works shall be employed to assist in the inspection of the construction of a public improvement when directed by the professional architect-engineer of record for the project. The budget for the public improvement shall include funding for the clerk. The clerk shall be hired through an open advertising and interview process by the architect-engineer. The clerk candidate recommended by the architect-engineer shall be subject to approval by both the owner and director before being hired. The clerk shall possess qualifications of education and experience in construction technology and administration compatible with the needs of the public improvement. The director may promulgate rules relative to this section.[126]

A fifty-year-old Minnesota Supreme Court case seems to allow only an employed clerk of the works for school projects. In *Krohnberg v. Pass,*[127] the court ruled that architect, engineer, and "superintendent of construction" service contracts do not require competitive bids:

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[121] Op. Att'y Gen. No. 77-192 (1977).

[122] Ariz. Rev. Stat. Ann. tit. 34 (Supp. 1983).

[123] Op. Att'y Gen. No. I83-016 (1983).

[124] Agency rules in some states undoubtedly address CM for schools and should be consulted.

[125] Me. Rev. Stat. Ann. tit. 5 § 1741 (Supp. 1984-85).

[126] *Id.* at § 1751.

[127] 244 N.W. 329 (Minn. 1932).

> The superintendent of construction was a personal representative of the school district. He watched the contractors to see that the work was done in accordance with the plans and specifications of the architects and engineers. It was not the intention of the statute that for such services there should be a public advertising for bids and a letting of the contract of employment to the lowest responsible bidder . . . .[128]

Summary

An examination of the status of CM for public school districts throughout the country reveals a mixed picture. The construction of educational facilities is clearly within the purview of the state legislatures. Generally, this state responsibility is delegated to the local school districts. While the responsibility is delegated, so too is the observance of public bid statutes.

Within the past few years, many states have moved toward more flexible approaches to how school districts may construct educational facilities. Relatively new management techniques, as successfully practiced in the private sector, appear to be increasingly commonplace. Intent on protecting public welfare, many legislatures have still accepted the fact that there are many different ways to build school facilities without necessarily resorting to the bidding of all services.

Public policymakers are beginning to realize that the public may well be protected through a CM project delivery system. Generally, educational administrators would agree that such statutory flexibility would enhance management prerogative and offer local school districts more discretion in securing the best educational facilities available within limited capital budgets.

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[128] *Id.* at 330-31.

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Punitive Damages in Civil Rights Actions

Kelly Frels

The Purpose of Punitive Damages

Punitive damages have been permitted in cases to deter wrongdoers from similar conduct in the future.[1] The focus of punitive damages is on the character of the tortfeasor's conduct, and the issue is whether it is of the sort that calls for deterrence and punishment over and above that provided by the award of compensatory damages.[2] The same rationale has been applied in the award of punitive damages in civil rights actions.[3]

Governmental Entities and Punitive Damages

In *City of Newport v. Fact Concerts, Inc.*[4] the Supreme Court determined that punitive damages were not available under 42 U.S.C. section 1983 against a municipality, political subdivision or officials sued in their official capacities. The lower courts have uniformly agreed,[5] except when the unavailability of punitive damages against governmental entities has not been properly plead as an affirmative defense.[6] In *Barnett v. Housing Authority of Atlanta,*[7] a case tried six months after *City of Newport,* the Eleventh Circuit found that the defendant had improperly objected to punitive damages and had waived the defense. In *City of Newport* the punitive damages was raised in the motion for new trial while in *Barnett* punitive damages was first raised in the motion for judgment notwithstanding the verdict. Another distinguishing factor was the absence of proof that the judgment would be paid from public funds since the Atlanta Housing Authority was a quasi public body.[8]

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[1] Restatement (Second) of Torts § 908(1) (1977).

[2] Smith v. Wade, 461 U.S. 30, 54 (1983); *accord* Stokes v. Delcambre, 710 F.2d 1120, 1126 (5th Cir. 1983).

[3] Wells v. Hico Indep. School Dist., 736 F.2d 243 (5th Cir. 1984) (deter or punish intentional violations of constitutional rights); Goodwin v. Circuit Ct. of St. Louis County, 729 F.2d 541 (8th Cir 1984) (deter future conduct in violation of civil rights).

[4] 453 U.S. 247 (1981).

[5] *See, In re* Selcraig, 705 F.2d 789, 797 n.11 (5th Cir. 1983) and Holly v. City of Naperville, 571 F. Supp. 668 (N.D. Ill. 1983).

[6] Barnett v. Housing Authority of Atlanta, 707 F.2d 1571, 1579-80 (11th Cir. 1983).

[7] *Id.*

Individuals and Punitive Damages

Although punitive damages are no longer available against municipalities, political subdivisions or those acting in their official capacities, punitive damages are available against individual defendants. Punitive damages are not, however, to be imposed as a matter of right. The award of punitive damages is within the sound discretion of the trier of facts,[9] and the trial court cannot be required to make an award of punitive damages.[10] The award of punitive damages must be imposed on the basis of the conduct and responsibility of individuals for the wrongdoing and not the defendants collectively.[11] The amount of the punitive award must be based in part on the financial resources of the individual defendant.[12] Most courts follow the rule that actual damages must be awarded before punitive damages can be assessed,[13] although some have held that only nominal damages are required as a predicate for punitive damages.[14]

Smith v. Wade and the Standard for the Award of Punitive Damages

One of the major issues associated with punitive damages which was left unanswered after *City of Newport* was whether intent to violate the rights of others or malice was a prerequisite for the award of punitive damages. The Supreme Court rejected the intent or malice requirement in *Smith v. Wade.*[15] In *Smith v. Wade,* the Supreme Court reviewed the various standards for the imposition of punitive damages in the civil rights tort context. The Court determined that the availability of punitive damages was accepted as settled law by nearly all state and federal courts at the time of enactment of the civil rights acts.[16] Further, the Court noted that the common law rule did not require a showing of actual malicious intent but permitted punitive award on varying standards of negligence, gross negligence, recklessness, or other culpable conduct short of actual malicious intent.[17] The Supreme Court found that neither the policies nor the purposes of section 1983 require a departure from this common law rule, thus a jury may be permitted to impose punitive damages in a section 1983 action when "the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.[18]

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[8] To assure that the absence of punitive damages is properly raised, it should first be plead as an affirmative defense in the answer or asserted in a Rule 12b motion to dismiss.

[9] Block v. R. H. Macey & Co. Inc., 712 F.2d 1241, 1246 (8th Cir. 1983); Longoria v. Wilson, 730 F.2d 300, 305 (5th Cir. 1984); McFadden v. Sanchez, 710 F.2d 907 (2nd Cir. 1983), *cert. denied* 104 S. Ct. 393 (1983).

[10] Merritt v. De Los Santos, 721 F.2d 598, 601 (7th Cir. 1983).

[11] McFadden v. Sanchez, 710 F.2d 907 (2nd Cir. 1983), *cert. denied* 104 S. Ct. 393 (1983); Clements v. United States, 568 F. Supp. 1150, 1171 (E.D. Cal. 1983).

[12] Vinyard v. King, 728 F.2d 428 (10th Cir. 1984); Harris v. Harvey, 605 F.2d 330 (7th Cir. 1979), *cert. denied,* 445 U.S. 938 (1980).

[13] Block v. R. H. Macey and Co. Inc., 712 F.2d 1241, 1246 (8th Cir. 1983); *In re* Selcraig, 705 F.2d 789, 797 (5th Cir. 1983).

[14] Goodwin v. Circuit Court of St. Louis County, 729 F.2d 541 (8th Cir. 1984), *cert. denied* 105 S. Ct. 112. *See,* note 24, *infra.*

[15] 103 S. Ct. 1625 (1983).

The Court also noted that the threshold standard for allowing punitive damages applies in a section 1983 case even though the underlying standard of liability for compensatory damages is also one of recklessness. In *Smith v. Wade,* the standard for the cause of action against Smith was "gross negligence" or "egregious failure to protect" the prisoner, Wade.[19] The Court explained that at common law the standards were equated and no reason exists to depart from that rule. [20]

Left untouched by *Smith v. Wade* is the stricter standard for the imposition of punitive damages in defamation cases where the Court stated that it did not want to inhibit the vigorous exercise of first amendment freedoms. In defamation cases, punitive damages cannot be assessed absent proof of "knowledge of falsity or reckless disregard for the truth."[21]

Lower Federal Court Interpretations of the Smith v. Wade Standard

Since *Smith v. Wade* has been handed down by the Supreme Court, numerous federal courts have addressed its applicability in civil rights cases. While numerous appellate courts have addressed *Smith v. Wade,* the decision most pertinent to the proper drafting of a punitive damage jury instruction is probably one rendered by the Seventh Circuit.

In *McKinley v. Trattles,*[22] the Seventh Circuit saw its task as

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[16] *Id.* at 1628-31.

[17] *Id.* at 1634; *accord* Boussom v. City of Elkhart, 567 F. Supp. 1382, 1389 (N.D. Ind. 1983).

[18] *Id.* at 1637 and 1640.

[19] *Id.* at 1628 and 1638.

[20] *Id.* at 1640.

[21] *Id.* at 1637 *citing and quoting* Gertz v. Robert Welch, Inc., 418 U.S. 323, 349, 94 S. Ct. 2997, 3011 (1974).

[22] 732 F.2d 1320 (7th Cir. 1984).

"requir[ing] us to apply the standards for awards of punitive damages in civil rights cases announced last year in *Smith v. Wade.*"[23] McKinley was a prisoner's rights case brought under section 1983 for a violation of the plaintiff's eighth amendment rights. The defendants in *McKinley* were prison officials who had performed a strip search upon the plaintiff in an unconstitutional manner. The Seventh Circuit affirmed the jury's award of $15,000 punitive damage subject to a remittitur reducing the award to an amount to be set at the discretion of the district court with a suggested guideline limitation of $6,000. It is important to note that this punitive damage award was affirmed without the jury awarding compensatory damages.[24]

The Court specially affirmed the district court's instructions to the jury on punitive damages holding that the instructions were "accurate and complete" and "comply with the Supreme Court's mandate in *Smith v. Wade.*" [25] The district court in *McKinley* had instructed the jury as follows:

> Punitive damages. Regardless of actual damages, the law permits the jury under certain circumstances to award the injured person punitive and exemplary damages in order to punish the wrongdoer for some violation of the constitutional rights or some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct.
>
> If the jury should find from a preponderance of the evidence in the case that the act or omission of the defendants which proximately caused actual injury or damage to the plaintiff was maliciously or wantonly or oppressively done, then the jury may, if in the exercise of discretion they unanimously choose to do so, award such amount as the jury shall unanimously agree to be proper as punitive and exemplary damages.
>
> An act or a failure to act is maliciously done if prompted or accompanied by ill will or spite or grudge either toward the injured person individually or toward all persons in one or more groups or categories of which the injured person is a member.
>
> An act or a failure to act is wantonly done if done in reckless disregard or callous disregard of or indifference to the rights of one or more persons including the injured person.

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[23] *Id.* at 1322.
[24] *Id.* at 1326.
[25] *Id.*

> An act or a failure to act is oppressively done if done in a way or manner which injures or damages or otherwise violates the rights of another person with unnecessary harshness or severity as by misuse, or abuse of authority, or power, or by taking advantages of some [weakness] or disability or misfortune of another person.[26]

The Seventh Circuit noted that under these instructions the jury could award punitive damages "only if [defendant] acted in reckless or callous disregard of [plaintiff's] rights, if [defendant's] actions were the result of spite or ill will or if the conduct was oppressive."[27] Furthermore, the court read these jury instructions as consistent with its prior decisions and *Smith v. Wade* which require "aggravating circumstances" and not mere negligence before punitive damages may be assessed.[28]

The courts of the Fifth Circuit have also had occasion to interpret jury instructions on punitive damages after *Smith v. Wade*. In *Longoria v. Wilson*,[29] the court was faced with determining whether a $15,000 punitive damage award was justified. *Longoria* involved a section 1983 claim against a police officer for using excessive force following arrest. The court reviewed the *Smith v. Wade* standard and specifically found that the district court had "instructed the jury in accordance with this standard."[30] The district court's instructions were as follows:

> [B]efore you can find punitive damages, you must find by a preponderance of the evidence that the officer not only acted in an illegal manner, but that he acted in a malicious and oppressive way, that his conduct was prompted by ill will or spite or grudge, and that he did this with extraordinary harshness or severity.[31]

The circuit court opinion does not reflect whether the district court defined the terms of this instruction. Nevertheless, the instruction was approved though not entirely tracking the *Smith v. Wade* language.

In an earlier Fifth Circuit opinion, the court approved a punitive damage instruction as "well within the boundaries of traditional tort standards for assessing punitive damages."[32] In *Stokes v. Del-*

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[26] *Id.* at n.2.
[27] *Id.*
[28] *Id.*
[29] 730 F.2d 300 (5th Cir. 1984).
[30] *Id.* at 305.
[31] *Id.* at n.9.
[32] Stokes v. Delcambre, 710 F.2d 1120, 1126 (5th Cir. 1983).

cambre,[33] the district court had instructed the jury that if the act or omission "which proximately caused the injury or damage to the Plaintiff . . . was maliciously or wantonly or oppressively done, then you may . . . add to the award such amount as you shall unanimously agree to be proper as punitive damages."[34] Again, the Fifth Circuit approved a jury instruction not containing the "reckless disregard" or "callous indifference" language of *Smith v. Wade*. Moreover, in *In re Selcraig,*[35] the Fifth Circuit stated again, in dictum, that a civil rights plaintiff has a right to punitive damages "if he can show that [defendant] made the charges maliciously." Thus, although courts in the Fifth Circuit have allowed the jury to be instructed in a manner not in full compliance with the *Smith v. Wade* standard, it would seem that had the plaintiffs in the above cases insisted on the *Smith* standard that it would be error to fail to instruct the jury accordingly.[36]

Other circuits have affirmed punitive damage awards on varying standards ranging from mere willfulness to gross recklessness. In *Merritt v. De Los Santos,*[37] the Seventh Circuit upheld a magistrate's imposition of a punitive damage award for deprivation of procedural due process. The circuit court held that a prison official violated the inmate's right to an impartial decision when he remained as a member of the disciplinary committee over the inmate's objection.[38] In *Grimm v. Leinart,*[39] the Sixth Circuit held: "In order to comply with the *Smith* standard, the district court should instruct the jury that it may award punitive damages if it finds that the defendant willfully and intentionally deprived plaintiff of his federally protected rights *or* if the defendant engaged in conduct that exhibited a reckless or callous disregard of the plaintiffs' rights." [40]

In a decision from the First Circuit, the court held a state official liable for his failure to intervene and prevent a chemical test performed upon the inmate plaintiff, ruling that such omission constituted a reckless and callous indifference to plaintiff's safety. [41] Although the court did not discuss the district court's jury instruction that a defendant is not liable for merely negligent failure to act, it did hold that the facts evidenced a breach of the official's duty of care and thus constituted a reckless and callous indifference to the inmate's safety.[42]

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[33] *Id.*

[34] *Id.* at 1126.

[35] 705 F.2d 789 (5th Cir. 1983).

[36] Hart v. Walker, 720 F.2d 1436, 1442 (5th Cir. 1983) (Fifth Circuit approved the award of punitive damages in a section 1983 case under either the state standard of "malice, fraud, oppression, willful wrong, or gross negligence" or the federal standard enunciated in *Smith v. Wade.)*

[37] 721 F.2d 598 (7th Cir. 1983).

[38] *Id.* at 602.

[39] 705 F.2d 179 (6th Cir. 1983).

[40] *Id.* at 182.

[41] Clark v. Taylor, 710 F.2d 4 (1st Cir. 1983).

In holding that the jury was improperly instructed in that punitive damages were not determined individually against each defendant, the Second Circuit in *McFadden v. Sanchez*[43] reversed the lower court's ruling and remanded for determination of individual liability as to damages. The circuit court provided in dicta what it considered an appropriate special verdict form, yet it did not discuss the substantive jury instructions on punitive damages except to the extent that punitive damages must be assessed individually.[44]

Possible Jury Interrogatory and Instruction

As is obvious from a review of these cases, the application of the *Smith v. Wade* standard seems to vary somewhat from circuit to circuit. At the risk of suggesting a national standard change, it appears that a post-*Smith v. Wade* jury interrogatory and instruction might be worded similarly to this one:

> What amount of money, if any, do you assess against the individual defendants as punitive damages, if any?
>
> Consider each defendant separately, and with respect to each defendant, consider both the liability and the amount individually for each defendant based upon that defendant's financial capacity to pay any award of punitive damages.
>
> You may consider an assessment of punitive damages only if you find by a preponderance of the evidence that the particular defendant's action proximately caused actual injury to the plaintiff and that the individual defendant not only acted in an illegal manner, but also that he acted in a malicious, wanton and oppressive way, that his conduct was prompted by ill will or spite or grudge and that he did this with extraordinary harshness or severity.

Even though the standard for punitive damages was set by *Smith v. Wade,* the opinion itself left leeway for adaptation by the lower courts. Without doubt the substantive tort laws of the states will influence the application of the *Smith v. Wade* standard in each circuit. Should the application become significantly different and conflicting some future supreme court might feel compelled to examine the subject again.

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[42] *Id.* at 10.

[43] 710 F.2d 907 (2nd Cir. 1983).

[44] *Id.* at 914 and 914 n.6.

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6

Interpreting the Education of the Handicapped Act: Recent Controversies and Future Directions

Stephen B. Thomas

The Education of the Handicapped Act (EHA), as amended by Public Law (PL) 94-142, reflects a long history of state and federal legislation and case law. Prior to the Act, most states had passed legislation opposing both discrimination against handicapped persons and the exclusion of handicapped children from public schools. State laws and agency regulations varied substantially, however, and enforcement generally was poor. Similarly, federal statutes provided inadequate guidance and enforcement, while funding also was limited. Given the reluctance of legislators, both state and federal, to pass comprehensive legislation and to establish an administrative machinery capable of enforcing related mandates, handicapped persons turned to the courts to acquire more timely relief from persons, organizations, and institutions that continued to discriminate against them.

From several of these early cases (1969-74) the position emerged that the functional exclusion of handicapped children from public schools was a violation of the fourteenth amendment to the federal Constitution. In addition, support for the rights of handicapped persons among constituent groups continued to grow during the same period. Political pressure peaked during 1974 and 1975 when steps were taken to ensure the passage of PL 94-142. This enactment was a complete revision of part B of the EHA. Although sections other than part B remained basically unchanged, the impact of the revisions to that part were so comprehensive that PL 94-142 has become known as the Bill of Rights for the education of handicapped children.

When Congress revised part B, it identified several purposes: to ensure that a free appropriate public education (FAPE) is made available, in the least restrictive environment to each handicapped child between the ages of three and twenty-one (section 1412(2)(B)) (except where state law, state practice, or court order restricts the participation of children aged three, four, five, eighteen, nineteen, twenty, or twenty-one); to guarantee that the rights of handicapped children are protected; to assist state and local units financially in providing appropriate programs; and to assess the effectiveness of efforts to provide appropriate programs. In meeting the stipulations of the Act, recipients are required to identify, locate, and evaluate all resident handicapped children; to develop an individual education program (IEP) for each handicapped child; to establish procedural safeguards; and to hold in confidence information and data used in evaluation and placement.

To be classified as *handicapped,* a child must be mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired, or have a specific learning disability *and,* by reason thereof, require special education and related services (section 1401(1)). Accordingly, a child may possess a handicapping condition but may not be in need of special education and related services and, therefore, may not be identified as handicapped under the Act or be eligible for a FAPE.

A FAPE requires special education and related services that (1) are provided at public expense and are under public supervision and direction; (2) meet the standards of the state education agency; (3) include an appropriate preschool, elementary, or secondary education; and (4) conform with a child's IEP (section 1401(18)). *Special education* is defined as "specially designed instruction . . . to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions" (section 1401(16)). *Related services* include transportation and such developmental, corrective, and other supportive services that are necessary to assist a handicapped child to benefit from a special education (section 1401(17)). Accordingly, a child would be eligible for related services, only if he were receiving special education.

Literally hundreds of federal cases were filed during the late 1970s and early 1980s seeking judicial interpretation of both the content and the intent of the EHA. Only three of these cases, however, reached the Supreme Court: *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982); *Irving Independent School District v. Tatro* (1984); and *Smith v. Robinson* (1984). Each of these cases is summarized briefly in the following sections of this chapter. Following these summaries is a fourth section where future directions are identified.

Board of Education of the Hendrick Hudson Central School District v. Rowley[1]

The first Supreme Court case interpreting the EHA was *Board of Education of the Hendrick Hudson Central School District v. Rowley.*[2] In that six-to-three Supreme Court decision, the plaintiff (Amy Rowley) was deaf, but was an excellent lipreader. In an effort to communicate with her and her deaf parents, local school administrators took a course in sign language interpretation, installed a teletype machine, and provided Amy with an FM hearing aid. The IEP prepared during Amy's first grade year stipulated that she be assigned to a regular first grade class and that she receive (1) tutorial instruction for one hour per day and (2) assistance from a speech therapist for three hours per week.

The parents accepted each of these provisions, but requested that Amy also have a sign language interpreter assigned to her when she attended academic classes. The district had provided an interpreter for a two week period while Amy was in kindergarten. This service was discontinued, however, based on information provided by the former interpreter and by the placement committee. The professionals working with the child concluded that she was not in need of such assistance and, at times, actually was distracted by the interpreter's presence.

Following the administrative decision not to provide an interpreter, the parents appealed to an impartial hearing officer. The officer ruled in favor of the district and observed that the plaintiff was achieving educationally, academically, and socially without such aid. On further appeal, the New York State Commissioner of Education affirmed the examiner's decision.

After exhausting administrative remedies, suit was filed in federal district court.[3] That court observed that Amy was remarkably well adjusted, that she interacted and communicated well with her peers, and that she maintained extraordinary rapport with her teachers. However, the court observed that, although Amy's performance in school was above average, she would have learned even more if she were not handicapped. This disparity between Amy's achievement and theoretical potential somehow led the court to conclude that a FAPE had not been provided and that a sign language interpreter was necessary. The Second Circuit Court of Appeals affirmed the decision,[4] and appeal was granted by the Supreme Court.

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[1] Portions of this chapter are derived from another NOLPE publication written by the same author, Stephen B. Thomas, Legal Issues in Special Education (1985).

[2] 458 U.S. 176 (1982).

[3] 483 F. Supp. 528 (S.D.N.Y. 1980).

In its analysis, the Supreme Court majority reasoned that "if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and other items on the definitional [FAPE] checklist are satisfied, the child is receiving a 'free appropriate public education' as defined by the Act."[5] According to the Court, federal law does not guarantee that individualized instruction will be sufficient to maximize a child's potential commensurate with the opportunities provided to other children,[6] or that handicapped children necessarily will learn; however, the IEP should be sufficient to confer *some educational benefit.* Furthermore, in determining whether an education is "appropriate," the Court restated the position that great deference should be given to the judgments of educators, and that courts should not substitute their own notions of sound educational policy for those of the school authorities.[7]

In supporting this interpretation of a FAPE, the Court rejected the position that the EHA was intended to provide *equal educational opportunity* for handicapped children and stated:

> Furnishing handicapped children with only such services as are available to nonhandicapped children would in all probability fall short of the statutory requirement of "free appropriate public education"; to require, on the other hand, the furnishing of every special service necessary to maximize each handicapped child's potential is, we think, further than Congress intended to go. Thus to speak in terms of "equal" services in one instance gives less than what is required by the Act and in another instance more. The theme of the Act is "free appropriate public education," a phrase which is too complex to be captured by the word "equal" whether one is speaking of opportunities or services.[8]

In conclusion, the Court noted that Amy was (1) being educated in the regular classroom; (2) receiving passing grades; and (3) advancing from grade to grade.[9] Accordingly, it reversed the lower court decision and ruled that the state had complied with the EHA.

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[4] 632 F.2d 945 (2d Cir. 1980).

[5] 458 U.S. 176, 189 (1982).

[6] *Id.* at 186, referring to the position taken by the district court, 483 F. Supp. 528, 534 (S.D.N.Y. 1980).

[7] 458 U.S. 176, 206 (1982).

[8] *Id.* at 198-99.

[9] *Id.* at 210.

Irving Independent School District v. Tatro

A second Supreme Court case involving the EHA is *Irving Independent School District v. Tatro.*[10] In that case, the plaintiff (Amber Tatro) had spina bifida and, as a result, suffered from orthopedic and speech impairments in addition to a neurogenic bladder. Amber was unable to voluntarily urinate and required clean intermittent catheterization (CIC) every three to four hours.

The local school district developed an IEP for the plaintiff which included early childhood development classes and physical and occupational therapy, but did not include CIC. As a result, the parents appealed the decision of the district through administrative channels, but were unsuccessful. They also were denied a preliminary injunction at the district court level,[11] where it was reasoned that CIC was not a related service because "it did not serve a need arising from the effort to educate."[12] Furthermore, the court proposed that section 504 was not violated, because the Rehabilitation Act (RA) does not require educators to provide health care for people who wish to participate in federally funded programs.

The Fifth Circuit Court of Appeals reversed the lower court decision[13] and held that CIC was a related service: it was necessary in order to permit the child to attend school and thereby benefit from special education. Accordingly, to deny such service was a violation of the EHA. Furthermore, because denying CIC services functionally excluded the plaintiff from public schools, a section 504 violation also was present. Following the establishment of these positions, the appeals court remanded the case to the district court.

On remand, the district court noted that because a doctor was not needed to administer CIC, it was not a medical service and, therefore, was not limited to diagnosis and evaluation. Accordingly, the school district was ordered to modify Amber's IEP to include CIC and to pay compensatory damages; furthermore, because section 504 also was violated, attorney's fees were awarded. The Fifth Circuit affirmed this decision,[14] and appeal was granted by the Supreme Court.

In arriving at its conclusions, the High Court made several relevant observations: a child must be handicapped to receive special education and, therefore, to be eligible for related services; only those services which are necessary to aid a handicapped child to benefit from special education must be made available; CIC is not a medical service which must be provided by a licensed physician; related services include school health services which are provided by a qualified school nurse or other qualified person; and CIC can be a supportive service which is necessary for a child to benefit from special education. Given these positions, the Court ordered the school district to provide Amber with CIC because, for her, such service was found to be necessary if she were to attend school and benefit from special education; however, attorney's fees were not required, because section 504 is not applicable where relief is available under the EHA.

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[10] 703 F.2d 823 (5th Cir. 1983), *rev'd in part,* 104 S. Ct. 3371 (1984).

[11] Tatro v. Texas, 481 F. Supp. 1224 (N.D. Tex. 1979).

[12] *Id.* at 1227.

[13] Tatro v. Texas, 625 F.2d 557 (5th Cir. 1980) (Tatro I).

[14] Tatro v. Texas, 703 F.2d 823 (5th Cir. 1983) (Tatro II).

Smith v. Robinson

In *Smith v. Robinson,* the plaintiff (Tommy Smith) suffered from cerebral palsy and a variety of physical and emotional handicaps.[15] The district had placed him in a hospital day program but withdrew funding after eleven months of services, claiming that the State Division of Mental Health, Retardation, and Hospitals was responsible for educating emotionally disturbed children. (This position later was rejected by the Rhode Island Supreme Court.) The plaintiffs appealed the superintendent's decision to cease funding and filed a complaint in federal district court. The complaint was amended and supplemented on several occasions and included constitutional, RA, and EHA violations. By the time the complaint reached the Supreme Court, the primary question was whether attorney's fees could be awarded under either the fourteenth amendment or the RA in a proceeding to secure a FAPE for a handicapped child.

Fourteenth Amendment

Where due process or equal protection rights are violated by state officials, 42 U.S.C. section 1983 authorizes suits to redress violations; furthermore, 42 U.S.C. section 1988 permits the awarding of attorney's fees.[16] As a general rule, a prevailing plaintiff recovers fees unless "special circumstances render such an award unjust,"[17] even if the constitutional claim was never addressed, and even if the statutory claim on which the plaintiff prevailed is one for which fees cannot be awarded under that Act.[18] If this were not the situation, plaintiffs would be penalized in each case where a nonconstitutional claim was dispositive.[19] However, fees may not be awarded where the work done was on a claim in which a plaintiff did not prevail and which involved distinctly different legal theories from the successful claim.[20]

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[15] 703 F.2d 4 (1st Cir. 1983), *aff'd,* 104 S. Ct. 3457 (1984).

[16] *See* Maine v. Thiboutot, 448 U.S. 1 (1980); Hutto v. Finney, 437 U.S. 678 (1978).

[17] Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968). In *Newman,* the Court also noted that "[i]f successful plaintiffs were routinely forced to bear their own attorney's fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts," at 402.

[18] Maher v. Gagne, 448 U.S. 122, 132 n.15 (1980).

In the *Smith* case, the plaintiff was not provided a full hearing prior to terminating funding and, as a result, was able to obtain an injunction to prevent a *due process* violation. The lower court required the local board to pay the attorney's fees that were incurred in obtaining the injunction; this award, however, was not challenged on appeal and the Supreme Court majority "assumed" that it was proper. Nevertheless, the Court was quick to note that simply because fees were justified for the initial due process violation did not mean that the plaintiffs were entitled to fees for all subsequent administrative and judicial proceedings.[21]

In fact, the majority ruled that the EHA, where applicable, was intended to be the exclusive avenue through which a plaintiff may assert an *equal protection* claim to a FAPE.[22] Otherwise, plaintiffs challenging provisions of a FAPE could go directly to federal court under section 1983, rather than exhaust the administrative appeals required by statute. The majority opined that Congress apparently had felt that local and state educational units should not be burdened with attorney's fees for successful plaintiffs, assuming that litigants were provided with the "process they were constitutionally due."[23] Accordingly, if a district wanted to avoid possible fourteenth amendment and related 1983 and 1988 suits, it must ensure that existing due process procedures are adequate.

Rehabilitation Act

In addition to the fourteenth amendment, plaintiffs also have sought relief under section 505 of the RA, which provides for the award of attorney's fees where circumstances warrant. Section 504 of the RA provides that "[n]o otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance . . . . "

Although this statute has a broad reach, its application has been delimited by the Court to situations were the RA and the EHA are not coextensive. In support of this position, the Court said that the significant difference between the two statutes (the RA and the EHA) is that the rights assumed to be guaranteed by both are specifically required only by the EHA.[24] Furthermore, the general antidiscrimination provisions of section 504 do not require affirmative action on behalf of handicapped persons; they require only that recipients of federal financial assistance not discriminate based on handicap. Based on these findings, the Court ruled that "[w]here section 504 adds nothing to the substantive rights of a handicapped child, we cannot believe that Congress intended to have the careful balance struck in the EHA upset by reliance on section 504 for otherwise unavailable damages or for an award of attorney's fees."[25] Accordingly, in cases where provision of an EHA-based FAPE is disputed, relief is not available under the RA.

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[19] Smith v. Robinson, 104 S. Ct. 3457, 3460 (1984).

[20] *Id.*

[21] *Id.* at 3467.

[22] *Id.*

[23] *Id.* at 3470 n.17.

Future Directions

Given the precedents established by the Supreme Court in the above cases, a number of changes are likely to occur within educational units which provide for the needs of handicapped children. It is clear that the Court has and will continue to show great deference for the expertise of educators in identifying, evaluating, and placing handicapped children. If parents are unsatisfied with related decisions, they have the right to seek independent evaluations, and to appeal such decisions to impartial hearing officers, state reviewers, and courts. However, the Supreme Court has concluded that in FAPE-related cases, specific EHA procedures are not to be circumvented (e.g., by resort to section 1983 or section 504 suits), while available relief is restricted only to that provided under the EHA. Possible awards include injunctive relief and, according to selected federal circuit courts, monetary damages in exceptional circumstances.[26]

During the next several years, there should be a greater effort to guarantee that available due process procedures are both adequate and comprehensive. Where parents have not been notified of their rights, where initial hearings are not given, and where administrative appeals are not available, educational units will not be providing "the process that is due," and will be forced to respond to injunctions and possibly to pay attorney's fees. As a result, districts are likely to provide additional assurances to both parents and courts that disputes will be settled fairly and timely. The use of mediators is likely to expand in an effort to provide timely action and to reduce the cost and number of impartial hearings. Furthermore, time limits are likely to be more rigidly adhered to than in past years.

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[24] *Id.* at 3472.

[25] *Id.* at 3474.

[26] *See, e.g.,* Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981), where two exceptional circumstances were identified: (1) where there was a risk to the child's physical health; and (2) where the educational unit acted in bad faith by failing to comply with the procedural provisions of the EHA in an egregious fashion.

Notwithstanding such improvements in providing for due process, precedents established in these Supreme Court cases may reduce the probability that handicapped children who have not been provided with a FAPE may acquire relief in federal courts. Parents who feel that an appropriate program has not been provided, and who have been unsuccessful in administrative appeals, must decide whether it is financially advisable to pursue their claim in the courts. Depending on the nature of the controversy, attorney's fees could be larger than any relief which may be awarded. Justice Brennan, in his dissenting opinion in *Smith,* noted this paradox and stated that "[i]t is at best ironic that the Court has managed to impose [the liability of attorney's fees] on handicapped children in the course of interpreting a statute wholly intended to promote the educational rights of those children."[27] He suggested that the conflict between the EHA, on the one hand, and section 504 and section 1983, on the other, is simply to "require a plaintiff with a claim covered by the EHA to pursue relief through the administrative channels established by that Act before seeking redress in the courts under section 504 or section 1983."[28] He noted that "[u]nder this resolution, the integrity of the EHA is preserved entirely, and yet sections 504 and 1983 are also preserved to the extent that they do not undermine the EHA."[29] (Justice Brennan's position regarding this issue is shared only by two other members of the Court — Justices Marshall and Stevens.)

Many future controversies regarding such issues as the scope and availability of related services, the availability of extended year schooling, the use of information obtained in a parent-financed evaluation, the assessibility of programs, and the appropriateness of IEPs are now more likely to be settled in administrative hearings. Although hearings have a definite appeal, it is unfortunate that they will result from the lack of affordable judicial alternatives, rather than from the desire of educators and parents to work together in identifying and providing for the educational needs of handicapped children.

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[27] Smith v. Robinson, 104 S. Ct. 3457, 3479 (1984) (Brennan, J., dissenting).
[28] *Id.* at 3475.
[29] *Id.*

As the EHA has been interpreted by the majority of the Supreme Court, the only handicapped children who will attempt to vindicate their rights in federal court are those who can afford legal action and who, on balance, will profit from such action; unfortunately, others will lose. Such practice may favor public coffers, but that advantage is at the expense of those who are least able to shoulder an additional court-imposed burden.

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State Action and the Public Spheres Doctrines: Constitutional Inroads into the Private Sector

Steve W. Batson

Gifis defines "state action" as "a term used to describe claims arising under the due process clause of the fourteenth amendment and the Civil Rights Act for which a private party is seeking damages or other proper remedy because the state has violated that party's civil rights."[1] Charles Black calls this doctrine "the most important problem in American law"[2] and goes on to describe it as "a 'doctrine' without shape or line . . . a torchless search for a way out of a damp echoing cave . . . a conceptual disaster area."[3] David Stern comments that the one hundred year-old doctrine "operates as a healthy limitation on suits brought under the fourteenth amendment (but) . . . that the doctrine has not aged gracefully."[4]

Formal to Functional

How has this doctrine evolved over the past century and arrived in the 1980s with such mixed reviews? A thorough analysis of the "transfiguration" of this doctrine, as Leslie Goldstein[5] describes it, begins with the *Slaughterhouse Cases*[6] and the *Civil Rights Cases.*[7]

The *Slaughterhouse Cases*[8] viewed both the thirteenth amendment (prohibiting slavery and involuntary servitude)[9] and the fourteenth amendment (prohibiting state deprivation of life, liberty, or property without due process; nor denial of equal protection)[10] as limited primarily to blacks and "intended to prevent the hostile discrimination against the negro race so familiar in the states where he had been a slave."[11]

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[1] S. Gifis, Law Dictionary 452 (2nd ed. 1984).

[2] Black, *The Supreme Court, 1966 Term — Foreword: "State Action," Equal Protection, and California's Proposition 14,* 81 Harv. L. Rev. 69 (1967).

[3] *Id.* at 95.

[4] Stern, *State Action and Chapter 766: Rendell-Baker and the Demise of the Public Function Doctrine,* 19 New Eng. 237 (1983).

[5] Goldstein, *Death and Transfiguration of the State Action Doctrine — Moose Lodge v. Irvis to Runyon v. McCrary,* 4 Hastings Const. L.Q. 1 (1977).

[6] 83 U.S. 36 (1872).

[7] 109 U.S. 3 (1883).

[8] 83 U.S. 36 (1872).

[9] U.S. Const. amend. XIII, § 2.

The famous *Civil Rights Cases*[12] extended the breadth of the fourteenth amendment, stating that the amendment "prohibits any state legislation which has the effect of denying to *any* race or class, or to *any* individual, the equal protection of the laws."[13] But Justice Bradley concluded that the private discrimination involved in refusing accommodations on the basis of race was not a badge of slavery or servitude. The Civil Rights Act was meant to counteract unconstitutional state action. According to Justice Bradley, "Civil rights . . . cannot be impaired by the wrongful acts of individuals, unsupported by state authority."[14] This agency theory, asserting that the state could only act through its agents and instrumentalities, although quite limited in scope, provided the public-private basis for judicial rulings for at least the next sixty years. The agency theory required a formal governmental actor operating in this "public" sphere.[15] Various cases successfully applied this theory to administrative agencies, courts, municipalities, and universities.[16]

Interestingly, Justice Harlan's dissent in the *Civil Rights Cases*[17] foreshadowed a later expansion of the scope of state action with the "public responsibility" or "public sphere" doctrine.[18] Using the cases arising from the 1875 Civil Rights Act[19] for discussion, Harlan rhetorically asked what were the legal rights of blacks in respect to public conveyances, inns, and places of amusement. He then responded by concluding that a railroad corporation is a governmental agency, an innkeeper a quasi public employee, and an amusement park "not a matter purely of private concern."[20]

His philosphy, if not his words, were echoed in the public accommodations provisions of the 1964 Civil Rights Act,[21] although these provisions were based on the congressional power to regulate commerce rather than on fourteenth amendment legislation. In addition, as Goldstein notes, the Court in a 1971 case, *Griffin v. Breckenridge,*[22] endorsed a thirteenth amendment approach "that was almost word-for-word a recapitulation of the dissent of Justice Harlan in the *Civil Rights Cases.*"[23]

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[10] U.S. Const. amend. XIV, § 1.

[11] 83 U.S. 36, 37-38 (1872).

[12] 109 U.S. 3 (1883).

[13] *Id.* at 24 (emphasis added).

[14] 109 U.S. at 17.

[15] Phillips, *The Inevitable Incoherence of Modern State Action Doctrine*, 28 St. Louis U.L.J. 683, 687 (1984).

[16] *E.g.*, Raymond v. Chicago Union Traction Co., 207 U.S. 20 (1907) (tax assessment); Twining v. New Jersey, 211 U.S. 78 (1908) (court decision); Lovell v. Griffin, 303 U.S. 444 (1938) (municipal ordinance); Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245 (1934) (rules of regents).

[17] 109 U.S. at 26 (Harlan, J., dissenting).

[18] Thigpen, *The Application of Fourteenth Amendment Norms to Private Colleges and Universities*, 11 J. Law & Educ. 171, 175 (1982).

[19] 18 Stat. 335.

[20] 109 U.S. at 42.

The state action doctrine gradually underwent a period of expansion, a transition from the formal public-private dichotomy to a functional analysis, from the late 1940s to the late 1960s, although the road to a broader interpretation had many detours. The public function (public sphere) doctrine made its first formative appearance in 1946 with *Marsh v. Alabama,*[24] a first and fourteenth amendments challenge by a Jehovah's Witness on a trespass conviction for distributing religious tracts on the premises of a company-owned town contrary to the wishes of the town's management. Disregarding the town's private status, Justice Black undertook a functional analysis, looking at what the town of Chickasaw actually was — a plot of land which the state had allowed to be used as a town. The Court held that: "Insofar as the State has attempted to impose criminal punishment on appellant for undertaking to disbribute religious literature in a company town, its action cannot stand."[25]

State Involvement

While the functional reasoning of *Marsh* did not appear again in a court ruling until the early 1960s, state action expanded in a different manner in 1948 using the judicial enforcement theory[26] of the state involvement doctrine. In *Shelley v. Kraemer,*[27] the Court held that:

> Private agreements to exclude persons of designated race or color from the use or occupancy of real estate for residential purposes do not violate the fourteenth amendment; but it is violative of the equal protection clause of the fourteenth amendment for state courts to enforce them.[28]

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[21] 42 U.S.C. § 2000a.
[22] 403 U.S. 88 (1971).
[23] Goldstein, *supra* note 5, at 11.
[24] 326 U.S. 501 (1946).
[25] *Id.* at 509.
[26] Thigpen, *supra* note 18, at 190.
[27] 334 U.S. 1 (1948).
[28] *Id.* at 1.

Going beyond earlier decisions which used a formal approach to state action (i.e., that state judicial officers could not administer an unconstitutional standard), *Shelley* held that the structured power of state government cannot be utilized to enforce an unconstitutional norm, even where the norm is formulted by private contracts.[29] The judicial enforcement theory was extended slightly in a few subsequent rulings, but the Court had dropped citations to *Shelley* by the 1960s, finding other criteria for state action.

The 1960s saw a proliferation of state action cases with *Burton v. Wilmington Parking Authority*[30] heading the list and utilizing the degree of state involvement as the standard for determining state action. A black male was refused service at a restaurant located in an automobile parking garage publicly owned and operated by the Wilmington Parking Authority, and he sued on the grounds that such refusal violated the equal protection provisions of the fourteenth amendment. The Court commented, in a now famous and often cited statement, that developing a precise formula for determining state involvement was an "impossible task" and that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[31] State involvement included owning and maintaining the building, providing parking for customers, receiving income from the lease, sharing tax-exempt status, having official signs and state and national flags flown on the building, and owning any improvements made to the facility.

Justice Clark stated that "[T]he State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity."[32] It should be noted that Justice Harlan, in his dissent, stated that the Court should first seek a clarification of the ruling by the Delaware Supreme Court before reaching "issues of such broad constitutional significance as those now decided by the Court, before the necessity for deciding them has become apparent."[33] *Burton* was significant because of its promulgation of the "symbiotic relationship" theory and the implication that criteria of governmental involvement should be assessed in their cumulative impact.[34]

The public function doctrine from *Marsh* awoke from hibernation in 1966 with *Evans v. Newton*[35] and in 1968 with *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza.*[36] Both *Evans* and *Logan Valley* expressed the same concerns with private power and the state being implicated in equal protection denial as those expressed in *Marsh.* The courts could not appoint trustees for a racially segregated park or enjoin labor picketing in a privately owned shopping center without being responsible for denial of equal protection.

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[29] Thigpen, *supra* note 18, at 191.

[30] 365 U.S. 715 (1961).

[31] *Id.* at 722.

[32] 365 U.S. at 725.

[33] *Id.* at 765 (Harlan, J. dissenting).

[34] Phillips, *supra* note 15, at 697.

The late 1960s perhaps represent a peak for the public function doctrine with several subsequent decisions, in effect, reversing *Evans* and *Logan Valley.* The 1970 case *Evans v. Abney*[37] essentially reversed the decision of the earlier *Evans* case. *Lloyd Corporation v. Tanner*[38] involved refusal by the owners of a private shopping mall to allow Vietnam War protestors to distribute handbills on its premises, a case very similar to *Logan Valley.* The Court distinguished *Lloyd* from *Logan Valley* and held for the company, stating that the handbilling was not related to the mall's operation.[39] In a 1976 case, *Hudgens v. NLRB,*[40] Justice Stewart's opinion declared that "[T]he ultimate holding in *Lloyd* had amounted to a total rejection of the holding in *Logan Valley,*"[41] thereby dealing a deadly blow to *Logan Valley. Hudgens* was remanded to the court of appeals to be remanded to the National Labor Relations Board for consideration under NLRA statutory criteria rather than a state action approach.

The state involvement doctrine and the judicial enforcement theory received additional reinforcement in 1970 with *Reitman v. Mulkey,*[42] a California housing discrimination suit. The Court cited *Burton* and upheld the judgment of the California Supreme Court that "[T]he provision (Proposition 14)[43] would involve the State in private racial discriminations to an unconstitutional degree."[44]

Contraction and Dichotomy

A significant opinion authored by Justice William Rehnquist, a new member of the Court in 1972, began a major contraction of the state action doctrine and a revival of the public-private sphere doctrine. The first case in the "Rehnquist Trilogy"[45] was *Moose Lodge No. 107 v. Irvis*[46] in which the Court found no state action responsible for a private club's refusal to serve liquor to a black male. Rehnquist distinguished *Moose Lodge* from *Burton*, stating that this was a private club on private property, and Irvis was a guest at the lodge and had not applied for nor been denied membership.[47] Citing the *Civil Rights Cases* and quoting from *Shelley*, Rehnquist restated that this was "private conduct, however discriminatory or wrongful, against which that clause (the equal protection clause) erects no shield."[48] As Goldstein notes, the Court in *Moose Lodge* "accentuated the limits against the enforcement of the Pennsylvania Liquor Board regulation that commands private clubs to obey their own membership requirements."[49]

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[35] 382 U.S. 296 (1966).
[36] 391 U.S. 308 (1968).
[37] 396 U.S. 435 (1970).
[38] 407 U.S. 551 (1972).
[39] *Id.* at 563-66.
[40] 424 U.S. 507 (1976).
[41] *Id.* at 518.
[42] 387 U.S. 369 (1967).
[43] Cal. Const. art. I, § 26.
[44] *Id.* at 378-79.

The second case in the trilogy, *Jackson v. Metropolitan Edison Company*,[50] is "perhaps the most significant single decision in the Burger Court's state action cutback."[51] In *Jackson*, Rehnquist introduced the "Jackson nexus test," rejected *Burton's* rationale of cumulative impact,[52] and further limited the public function doctrine to "powers traditionally exclusively reserved to the state."[53] Jackson sought damages and injunctive relief under 42 U.S.C. section 1983 for termination of her electrical service "before she had been afforded notice, a hearing, and an opportunity to pay any amounts found due."[54] Justice Rehnquist found no state action or symbiotic relationship despite the fact that termination of service for non-payment was a provision in the utility's general tariff approved by the public utility commission actually by lack of any commission action to disapprove it. The "Jackson nexus test" obviously required an extremely close relationship by the state not present here since the state had not directly considered this tariff provision nor ordered the termination of service.

Taking this authorization-compulsion distinction a bit further, Rehnquist found no state action in *Flagg Brothers, Inc. v. Brooks*[55] in which the Court rejected a due process challenge to a warehouseman's proposed sale of stored private goods pursuant to a provision of the New York Uniform Commercial Code. This case failed the "exclusivity" test[56] since the proposed sale was not the only means of resolution nor had the state granted Flagg Brothers a traditional sovereign prerogative. It is intersting to note Justice Marshall's dissenting comments that he was "troubled by the Court's cavalier treatment of the place of historical factors in the 'state action' inquiry . . . and that such an issue plainly cannot be resolved in a historical vacuum."[57]

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[45] Rowe, *The Emerging Threshold Approach to State Action Determinations: Trying to Make Sense of Flagg Brothers, Inc. v. Brooks*, 69 Geo. L.J. 745, 748 (1981).

[46] 407 U.S. 163 (1972).

[47] *Id.* at 163.

[48] 334 U.S. 1, 13 (1948).

[49] Goldstein, *supra* note 5, at 18.

[50] 419 U.S. 345 (1974).

[51] Phillips, *supra* note 15, at 704.

[52] 419 U.S. at 351.

[53] *Id.* at 352.

[54] *Id.* at 345.

[55] 436 U.S. 149 (1978).

A creditor remedy case similar to *Flagg* was considered by the Court in 1982 with a decision that state action was present. In *Lugar v. Edmonson Oil Co., Inc.,*[58] a writ of attachment was issued by a state court clerk against property which the petitioner may have sold to avoid a debt. Justice White called for preservation of a private sphere by limiting federal law and federal judicial power. He also presented a two-part approach for determining "fair attribution" of a federal right deprivation by the state:

> First, the deprivation must be caused by the exercise of some right or privilege created by the state or by a rule of conduct proposed by the state or by a person for whom the state is responsible . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.[59]

In two 1982 cases, the Court, with opinions delivered by Justices Burger and Rehnquist, used the "nexus" and "exclusivity" tests from *Jackson*[60] to again reject state action claims. *Blum v. Yaretsky*[61] involved claims of due process deprivation by nursing homes when involuntarily transferring medicaid patients to lower levels of care or involuntarily discharging them. The Court reasoned that those decisions were made by administrators and physicians—"concededly private parties."[62]

In *Rendell-Baker v. Kohn,*[63] former teachers and a counselor at a nonprofit, privately-operated school for maladjusted high school students brought a civil rights action against the school for constitutional rights violations in connection with their discharge. Students were referred to the school by public school districts under Chapter 766 of the Massachusetts Act of 1972 with ninety to ninety-nine percent of the school's funding derived from municipal, state, and federal funds and subject to extensive regulation by the state. In the opinion delivered by Justice Burger, the Court ruled that the action failed for lack of state action. Using *Jackson's* exclusivity test, Burger stated "that a private entity performs a function which serves the public does not make its acts state action."[64] Justice Marshall criticized the ruling as a "return to empty formalism."[65]

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[56] *Id.* at 160.
[57] 436 U.S. at 168 (Marshall, J., dissenting).
[58] 457 U.S. 922 (1982).
[59] *Id.* at 937.
[60] 419 U.S. 345 (1974).
[61] 457 U.S. 991 (1982).
[62] *Id.* at 999.
[63] 457 U.S. 830 (1982).

A desire by the present Court to preserve a broad private sphere, coupled with the strong emphasis on nexus and exclusivity and the obvious lack of a clear and unified theory of state action, combine to give no future promise of a resurgence or expansion of this exciting inroad of constitutional rights into the private sphere. As Phillips notes, "the result has been a number of inordinately complex, fact-specific state action decisions . . . "[66] with a growing trend toward rather involved and often circuitous and hazy arguments to achieve a desired ruling. Private educational institutions have remained relatively immune from fourteenth amendment restrictions at the United States Supreme Court level but have been held more accountable in lower court rulings. The state action doctrine, after one hundred years of transition, remains a difficult legal tool for the courts to define and administer.

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[64] *Id.* at 838.

[65] 457 U.S. 830, 843 (1982).

[66] Phillips, *supra* note 15, at 720.

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Section 1983 Liability: Recent Developments in the Merger of State and Federal Remedies

Richard S. Vacca

Introduction

The Civil Rights Act of 1871 (hereafter referred to as section 1983) provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.[1]

Simply stated, section 1983 was designed as a flexible and broad scoped statute to restrict a wide variety of actions of state officials. When acting in their official capacities, these officials (exercising a portion of the state's authority) cannot move to restrict or deny any person subject to them any right to which an individual is entitled under the Constitution as well as under federal laws. If a state official acts in derogation of one's protected rights, that official may be charged with a constitutional or civil rights tort.

When the Civil Rights Act of 1871 was enacted by Congress in the decade following the Civil War, the new law was designed primarily to ensure that newly emancipated blacks would be entitled to the same rights as other citizens. The Act was intended to bestow the guarantees of the fourteenth amendment on all black and white citizens. Its sponsors could not have envisioned the scope of its coverage 113 years later. Indeed, during the last two decades it has undergone a metamorphosis that many congressmen and judges might not have foreseen. Today, its impact is considerable on those involved in public education.

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1. The material contained in this Introduction is taken directly from R. Vacca & H. Hudgins, Jr., Liability of School Officials and Administrators for Civil Rights Torts (1982).

For many years, the Civil Rights Act of 1871 (42 U.S.C. section 1983) was largely ignored; but almost a century later, in 1961, the provisions of the Act were made applicable to local public school board members and administrators; and, in 1975, the Act was subsequently interpreted by the Supreme Court as a protection for students. In 1980, the Supreme Court ruled that a local governmental body whose official policy or custom violated a person's constitutional rights is not entitled to immunity from damages if its officials acted in good faith and in accordance with settled constitutional law. This case, testing good faith immunity of municipalities, was subsequently held applicable to local public school boards also.

During the past fifteen years the number of court cases in which provisions of the 1871 Act have been applied to school-related issues has increased geometrically. The number of court decisions began to increase steadily in the early 1970s. In 1979, the *Yearbook of School Law* reported an astonishing 1000% increase during the prior half-decade in court decisions that were based upon provisions of the 1871 Civil Rights Act. Thus, in a short period of our history, this piece of civil rights legislation has become what Thomas Shannon (Executive Director of theNational School Boards Association) has referred to as the most significant malpractice law for people in public education in this country.

The status of court suits taken by plaintiffs against public school systems was best summarized by Delon and Bartman. In their view, "the number of actions under 42 U.S.C. section 1983 of the Civil Rights Act of 1871 continues to increase at a dramatic rate. It appears that more attorneys who represent school employees now realize the importance of this federal statute."

As the number and bases of constitutional or civil rights tort cases have expanded, as have the amounts of damages sought (both punitive and compensatory), and equitable remedies. When the Act was first applied to school officials, no monetary damages were sought. Since then, however, plaintiffs have sought and been awarded increasing amounts of money, and some settlements have amounted to hundreds of thousands of dollars.

Not unexpectedly, this increasing litigation has been paralleled by a continuing metamorphosis in the interpretations by courts of what exactly constitutes good faith behavior on the part of (1) a school board as a corporate entity, (2) school board members in their official capacities and as individuals, and (3) school administrators in their official capacities and as individuals. For decades the aforementioned were immune to civil rights tort suits under section 1983. That, of course, is no longer true, and the resulting challenge for all concerned is to determine from the hundreds of cases that have been adjudicated since the early 1960s exactly what constitutes good faith behavior for boards and their members today.

For local school districts and their school board members, the dramatic increase in court actions based on the 1871 Civil Rights Act and the apparent ambiguity regarding good faith have had serious repercussions. First, court actions cost money and inevitably divert funds from a district's total educational program. Court settlements of damages can be very costly, and even when cases can be resolved before getting into court or when they are resolved in favor of the defendants, they will still require substantial expenditures of funds by a district. In addition, school districts have had to rely more on legal counsel and pay increased costs for insurance coverage.

Unfortunately, given rapid changes in the courts' interpretations of section 1983 and its applicability to school districts, many school board members and their administrative officers do not have a full understanding of the balance between their roles as policymakers and the rights of individuals under their jurisdiction. They may believe that a proposed policy is proper and in the best interest of the district, when, in fact, that policy may conflict with the duly constituted rights of an individual. Conversely, a teacher or student may claim a right that is not deserved or that is detrimental to the school community, and the board may need to intervene and make a decision that is properly within its province.

Through the court suits it has spawned, section 1983 is now responsible for a considerable portion of the litigation brought by teachers and students against school boards and school board members. As a result, the expanding court interpretations of what constitutes constitutionally protected rights in school settings have dramatically altered traditional relationships among school boards, their members, their professional staffs, and their students and parent clients.

To gain a better understanding of more recent developments of section 1983, it is necessary to look briefly at the period from 1961-1981. During that time (referred to as the foundational era of section 1983 suits), court decisions increased considerably the vulnerability of school boards, school board members, and school officials for the actions they may have taken which resulted in a deprivation of someone's rights. The courts established this vulnerability through a series of interpretations of section 1983 as it applied to state and local officials serving in a superordinate capacity and to governmental bodies as corporate entities.

The Foundational Development of Section 1983 (1961-1981)

For almost a quarter of a century we have witnessed a growing volume of court activity involving section 1983. A brief review of selected, significant court decisions follows.

The United States Supreme Court in *Monroe v. Pape* (1961)[2] clarified the applicability of section 1983 to local governmental bodies and their agents. In that decision the Court held that, although a municipal entity cannot be held liable under section 1983, an official can be liable. Five years later the Fourth Circuit, in *Johnson v. Branch* (1966),[3] said that school board members may be subject to legal action under section 1983.

In 1974, the Supreme Court, in *Scheurer v. Rhoads*,[4] distinguished between a suit against a government body and a suit against a governmental official. Officials, opined the Court, have considerably less protection in section 1983 suits than does the government body itself. The following year, in a public school student discipline case, *Wood v. Strickland*,[5] the Supreme Court both modified and clarified *Scheurer*. In rejecting the school board members' claims to *absolute immunity*, the high court instead adopted the standard of *qualified good faith immunity*. However, said the court, public school pupils may sue a school board member under section 1983 if the school board member

> knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the students affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.[6]

The *Wood* decision (1975) initiated a number of questions for subsequent courts to answer about the meaning of qualified good faith immunity.

Three years after *Wood*, the Supreme Court in *Cary v. Phiphus* (1978) addressed the question of damages as it relates to the deprivation of rights of students.[7] The Court treated two issues: the conditions that warrant the awarding of damges, and the amount of damages that can be assessed local school officials. By a vote of 8-0 the Supreme Court held that students were entitled only to nominal damages, absent proof of actual injury. Where a showing of actual injury is made, said the Court, there may be recovery of substantial damages appropriate to compensate such injuries, and punitive damages may be awarded to deter or punish malicious deprivations of rights.

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[2] Monroe v. Pape, 365 U.S. 167 (1961).

[3] Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966).

[4] Scheuer v. Rhoads, 416 U.S. 232 (1974).

[5] Wood v. Strickland, 420 U.S. 308 (1975).

[6] *Id.* at 322. See also Harlow v. Fitzgerald, 50 U.S.L.W. 4815 (U.S. 1982), wherein the Supreme Court placed the emphasis on liability of officials where "clearly established rights" were present.

[7] Carey v. Phiphus, 435 U.S. 247 (1978).

That same year (1978) the Supreme Court reversed the *Monroe* principle in *Monell v. Department of Social Services.*[8] *Monell,* a New York case, involved female employees who sought injunctive relief and back pay for defendants' actions in compelling them, as pregnant employees, to take unpaid leaves of absence from their jobs before they were medically required to do so. The Supreme Court's reasoning, speaking through Justice Brennan, is that a local governmental body can be sued if the action alleged to be unconstitutional was a result of a "government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under section 1983."[9] Beyond that, the Court did not make a statement on the precise nature of these practices.

In *Owen v. City of Independence* (1980), the Supreme Court established that local governing bodies are more vulnerable to suits under section 1983 than are their officers. Acting consistent with the *Wood* holding, the justices stated that, unlike government bodies, government officials may continue to enjoy good faith immunity. When government bodies violate, either through custom or policy, a person's protected rights, the governmental body is not entitled to immunity from damages. Further, the governmental body may not rely on the good faith of its officers as a defense to its own liability under section 1983.[10]

Where the above decisions established a remedy under section 1983 to individuals whose constitutional rights had been violated, a case out of Maine extended that interpretation to be applicable to individuals whose federal statutory rights had been violated. In *Maine v. Thiboutot* (1980) the Supreme Court ruled that, where a federal statute provides an exclusive judicial remedy, section 1983 does not apply, a point reiterated in subsequent decisions. Conversely, the Court said that section 1983 suits may be premised on violations of federal statutory laws that do not provide equitable or compensatory relief.[11]

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[8] Monell v. Department of Soc. Servs., 436 U.S. 658 (1978).
[9] *Id.* at 694.
[10] Owen v. City of Independence, 445 U.S. 622 (1980).

In 1981, another major Supreme Court decision on point arose out of Newport, Rhode Island. It raised the issue of whether section 1983 was intended to allow punitive damages against a municipality. Since the Court had already determined that compensatory damages could be awarded against a corporate body, *Newport* sought to extend previous rulings. The Court divided 6-3, the majority holding that punitive damages could not be assessed. Speaking for the majority, Justice Blackmun held that neither a history of the Act nor policy considerations justify "exposing a municipality to punitive damages for the bad faith actions of its officials." Section 1983, he said, was designed to expose certain state and local officials to a new form of liability. Punitive damages against the municipality, however, punishes the taxpayers, not the wrongdoers.[12]

Finally, in another decision from that year (1981), the Supreme Court established the initial question to answer in determining the feasibility of taking a civil rights tort action. Raised in the *Pennhurst State Board*[13] case (a matter involving federal statutory protections for developmentally disabled persons), the question was: "How does an individual create statutory rights in the first place?" Since the *Pennhurst* decision, the scope of section 1983 remedies for alleged federal statutory violations seems to have been limited.[14]

In summary, the following foundational principles of law concerning section 1983 were established as a result of the cases decided between 1961-1981: (1) Legal (*e.g.,* compensatory damages) and equitable remedies (*e.g.*, injunctive relief) were possible in matters where the official actions of school officials or their agents violate the federal constitutional and/or statutory entitlements of an individual; (2) Qualified and not absolute immunity was possible as a defense where school officials acted in good faith to carry out their responsibilities; (3) Punitive damages could not be assessed against a governmental unit (*e.g.*, the school board) but might be possible against an agent of the official body; and (4) Civil rights tort suits are remote where school officials can justify their policies and decisions as being necessary in the furtherance of some legitimate educational purpose.[15]

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[11] Maine v. Thiboutot, 448 U.S. 1 (1980).

[12] City of Newport v. Fact Concerts, Inc., 101 S. Ct. 2748 (1981).

[13] Pennhurst State School and Hosp. v. Halderman, 451 U.S. 1 (1981).

[14] See M. McCarthy, *The Developmentally Disabled Assistance and Bill of Rights Act: Pennhurst v. Halderman* in S. Thomas, N. Cambron-McCabe & M. McCarthy, Educators and the Law: Current Trends and Issues (1983).

[15] For an excellent treatment and summary of the formative period of section 1983 litigation see N. Cambron-McCabe, *School District Liability Under Section 1983 for Violations of Federal Rights,* 10 NOLPE Sch. L.J., at 107-108.

Recent Developments in Section 1983 Litigation

The language of section 1983 was directed at acts of misconduct and abuse by state officials. Thus, the presence of "state action" is and always has been the *sine qua non* in building a section 1983 case. In section 1983 actions the burden always has been on the plaintiff to show (1) the conduct complained of was carried out under color of state authority and (2) the conduct complained of deprived the plaintiff of some entitlement protected by either the Constitution or by federal statute.[16]

In effect, the purposes of the Act were "to provide a remedy where a theoretically adequate state remedy is not available in practice, and to provide a remedy in the federal courts supplementary to any remedy which any state might provide."[17] To put it another way, not only was section 1983 intended to supplement existing state remedies, but to override existing state remedies if they are judged to be either inoperative or inadequate.

Since the possibility exists that a Section 1983 case might come to federal court even after settlement in state court, a question may arise regarding the potential applicability of *res judicata*. Speaking directly to this concern Levenson has said,

> [t]here is little reason to fear that allowing 1983 actions after state court proceedings will permit double recovery. Section 1983 was designed, in part, to provide remedies that are not available or not commonly sought in the state forum. Further, the majority of 1983 cases which follow state proceedings are brought precisely because the state judgment did not prove satisfactory.[18]

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[16] 15 Am. Jur. 2d 305. *See*, e.g., Milonas v. Williams, 691 F.2d 931 (10th Cir. 1982). In Pratt v. Taylor, 101 S. Ct. 1908 (1981), the Supreme Court spelled out the initial inquiry regarding the taking of a section 1983 action in a two-pronged standard. First, whether the conduct complained of was committed by a person acting under color of state law. Second, whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.

[17] Vacca & Hudgins, *supra* note 1 at 24-25. Recently, in Enright v. Board of School Directors, 346 N.W.2d 771 (Wis. 1984), the court was faced with a suit filed by parents under both section 1983 and the common law of negligence. To the Wisconsin court, in a negligence pleading under section 1983 the court first must determine whether any state governmental unit provides redress that satisfies the requirements of procedural due process. And, said the court, just because state remedies may not provide all relief sought—which may have been available if plaintiff had proceeded solely under section 1983—does not mean that state remedy is inadequate.

[18] Vacca & Hudgins, *supra* note 1 at 25. Commenting on section 1983 in a recent case brought by a discharged college librarian, the West Virginia Supreme Court said: "It appears that in a section 1983 action, the United States Supreme Court has

It should be emphasized at this point that section 1983 was never and is not now intended to exist as an avenue to circumvent existing sources of remedy.

The possibility does exist that those individuals who once would have taken their initial complaint to a state court will now seek remedy in a federal court rather than state court. In recent years section 1983 has become an alternative for advocates seeking remedy for alleged civil rights violations where no remedy was available in a state forum, or where available remedy was considered inadequate.[19]

A brief review of selected cases in four issue areas follows and is intended to demonstrate a trend over the past two years for aggrieved persons to seek remedy in federal court through section 1983 where state remedy is either inadequate, non-existent, or inoperative.

Patsy v. Board of Regents and the Exhaustion of State Remedies

Generally, every state provides legislative, administrative and judicial remedies for aggrieved citizens. The traditional rule holds that an individual should exhaust state legislative or administrative remedies before challenging state action in federal court.[20] Generally, state judicial remedies need not be exhausted unless so provided by statute. What about the question of exhaustion of state remedies where they are either ineffective or nonexistent?

In 1982, the Supreme Court decided *Patsy v. Board of Regents.*[21] A Florida case, *Patsy* involved allegations of both race and sex discrimination by an employee of Florida International University. Patsy sought, among other things, damages and injunctive relief in a

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fashioned a federal common law of damages designed to make the damage remedies uniform and not necessarily dependent upon the law of the state where the cause of action arose." The Court also commented that the collateral source rule does not require that the damages awarded under section 1983 be reduced by the unemployment benefits paid the plaintiff while she was out of work. See Orr v. Crowder, 315 S.E.2d 593 (W. Va. 1983).

[19] Vacca & Hudgins *supra* note 1 at 82. In a recent public school student suspension case the United States District Court, Eastern District of Pennsylvania, reminds us, regarding the federal rules of civil procedure:

> Where a claim arises under state law and the parties on either side of the claim are non-diverse, a district court has not independent federal jurisdiction. In such cases, the court may not hear the claim unless it falls within its power of pendent jurisdiction. Where, as here, the state and federal claims derive from a common nucleus of operative fact and are such that they would ordinarily be expected to be tried in one judicial proceeding, then the court has the power to hear the state claim provided issues are substantial .... Ordinarily, if the federal claim as pleaded is sufficient to confer subject matter jurisdiction on the court, it is substantial .... See White v. Salisbury Township, 588 F. Supp. 608 (E.D. Pa. 1984), at 615.

[20] Vacca & Hudgins, *supra* note 1 at 24.

[21] Patsy v. Board of Regents, 102 S. Ct. 2557 (1982).

federal district court. The Florida Board of Regents argued that her complaint should be dismissed since she had not exhausted available state administrative remedies. The district court agreed with the board of regents and granted a motion to dismiss.

The Fifth Circuit interpreted section 1983 and held that exhaustion of administrative remedies may be necessary. The case was remanded to the district court to evaluate the adequacy of existing administrative remedies.

The Supreme Court subsequently reversed the Fifth Circuit. Except in matters involving prisoners and other institutional persons, said the Court, exhaustion of state administrative remedies generally is not a prerequisite to an action under section 1983. Thus, the Court would not impose such a rule where exhaustion of remedies was not required by legislative enactment.

More recently, a 1984 case out of the Third Circuit, *Cohen v. City of Philadelphia,*[22] treated the issue of the availability of state judicial review of a city civil service commission's decision to reinstate a wrongfully discharged police officer, but without awarding the officer back pay. Rather than appeal the commission's decision in the state court system, the officer brought an action in federal court pursuant to section 1983.

In *Cohen,* the Third Circuit held that "substantive mistakes by administrative bodies in applying local ordinances do not create a federal claim so long as correction is available by the state's judiciary.[23] What is more, said the Court, "the state has provided the officer with due process by providing reasonable remedies to rectify a legal error by a local administrative body, and that therefore he has not alleged a constitutional violation entitling him to sue under section 1983."[24] The court then made the point that "the very existence and efficacy of such remedies defeats his claim that he was deprived of property without due process of law."[25] The impact of recent section 1983 decisions was summarized best by Thomas and Fritz. In their analysis of *Patsy,* they state,

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[22] Cohen v. City of Philadelphia, 52 U.S.L.W. 2711 (U.S. June 26, 1984), at 2711.

[23] *Id.*

[24] *Id.* As the Fifth Circuit said this year in a corporal punishment matter, "Every tort committed by a state official is not a violation of constitutional rights. Every deviation from a state agency regulation does not constitute a denial of due process. The fourteenth amendment did not make every trespass by a state government a deprivation of federal constitutional rights." Woodard v. Los Fresnos Indep. School Dist., 732 F.2d. 1243 (5th Cir. 1984).

[25] *Id.* For a recent decision involving the issue of exhaustion of state administrative remedies and parents challenging a school district's education plan for their physically handicapped child, see Wilson v. Marana, 735 F.2d.1178 (9th Cir. 1984). *See also* Quackenbush & Johnson City Central School Dist., 716 F.2d 141 (2d Cir. 1983).

Section 1983 provides a broad base for law suits while relief may vary with the gravity of the offense (nominal to punitive). Jury trials are available under the Act and exhaustion of administrative remedies is not always required. Accordingly, the number of cases will continue to grow.[26]

Flores v. Edinburg and the Merger of Negligent Torts with Civil Rights Torts

Since the growth of section 1983 actions, a distinction has been made between the new "civil rights tort" and the traditional "negligent tort." Simply stated, a tort is a civil wrong, other than breach of contract, for which a court (generally a state forum) will provide remedy in the form of money damages. The wrong grows out of harm to an individual by the unreasonable conduct of others. The remedy is premised on the notion that one should be allowed to recover from the one who harmed another person.[27]

Until the mid to late 1970s, the case law on point showed clearly that public school systems liability for student and teacher injury was limited in state courts to the negligent or common law tort in such matters as broken bones, cuts, burns and the like, occurring in certain high risk areas (*e.g.*, vocational shops, science classes, and physical education activities). The current liability arena, however, is expanding gradually to include section 1983 suits, taken in federal court. In the early cases, however, the typical federal court attitude was that plaintiffs' claims sounded more in tort as breaches of school board or teacher duties to students, and that such matters did not rise to the level of a constitutional claim cognizable in an action pursuant to section 1983. Recently, this traditional view has undergone some modification. A case on point is *Flores v. Edinburg Consolidated Independent School District.*[28]

In *Flores* a public school student (David Flores, age fourteen), had cut his hand on a table saw while doing a class project (the class was an industrial arts woodshop). He was cutting a board on a power saw from which the safety guard had been removed one month earlier because it was broken.

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[26] S. Thomas & M. Fritz, *Exhaustion of Remedies Under Section 1983; Patsy v. Board of Regents of the State of Florida,* in Thomas, Cambron-McCabe & McCarthy *supra* note 14. According to Morris, the Supreme Court has, in effect, through subsequent decisions limited the *Thiboutot* opinion and restricted the application of section 1983 "to the vindication of federal statutory rights that are not accompanied by a detailed, comprehensive enforcement mechanism." *See* A. Morris, *Obstructing the Process of Justice in the Federal Courts,* 11 West's Educ. L. Rep. (July 28, 1983).

[27] Vacca & Hudgins, *supra* note 1, at 7-8.

[28] Flores v. Edinburg Consol. Indep. School Dist., 554 F. Supp. 974 (S.D. Tex. 1983). The facts described in the paragraphs that follow are taken directly from *Flores,* at 976-977.

At the time the student was cut (it should be pointed out that he received a serious and permanent injury), the teacher was out of the laboratory, and in his office. After the injury had occurred, the teacher was summoned from his office.

According to Frels and Horner, subsequently a section 1983 action was taken in federal district court. Ultimately, a $500,000 judgment was rendered against the school district. At trial, the jury had been instructed that the injured student had had a *liberty interest* in a "safe environment at school."[29] And, if a public school violates this liberty interest (*e.g.*, a safe and hazard free environment) and a student is injured, said the Court, this amounts to a constitutional deprivation without due process of law.

In their comprehensive analysis of *Flores,* Frels and Horner suggest that the court's decision, and other cases on point, demonstrates "as a trend toward recognizing that section 1983 provides a cause of action for the negligent deprivation of liberty interests."[30]

The significance of *Flores,* state Frels and Horner, is summarized best by the following three points: (1) the decision extends the scope of section 1983, especially "concerning negligently-incurred deprivation of liberty interests"; (2) the decision demonstrates that liberty interests are definable and can be sufficient enough to warrant inclusion under section 1983; and (3) the decision demonstrates the potential for this type of suit in other education matters."[31] If the *Flores* reasoning is followed, opine Frels and Horner, "a court might find a constitutional deprivation in the educational context even if only a slight, rather than egregious, abridgement of a plaintiff's liberty interest has occurred."[32]

A key point in the above quotation is the notion of *egregiousness.* Generally defined as conspicuously bad, flagrant, and outrageous abuse of official authority and power, and something that "shocks the conscience of the court," the element of *egregiousness* has been, up to *Flores,* the "ultimate question in determining whether the claim is a simple tort or a constitutionally protected right." [33]

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[29] For an excellent and complete analysis of the *Flores* case and its implications for section 1983 actions, see K. Frels & J. Horner, *The Negligent Deprivation of Liberty Interests under 42 U.S.C. Section 1983; Flores v. Edinburg Consolidated Independent School District,* 14 West's Educ. L. Rep. 615 (January 26, 1984).

[30] *Id.* 618-619. It is interesting to note that the district court drew a parallel between the liberty interest of this student (when serious injury was caused by the teacher's negligence), and a student's liberty interest being implicated in a situation where corporal punishment has been applied by a teacher. *Flores,* 554 F. Supp., at 980.

[31] *Id.* at 621.

[32] *Id.* at 622.

[33] *Id.*

In summary, Frels and Horner make the followng judgment regarding the possible ramifications of the *Flores* decision:

> *Flores* appears to alter the long-standing development of common law and constitutional tort law. Constitutional torts and common law torts are rolled into one indiscernible package, making local governmental entities, such as school districts, liable for virtually every negligent injury inflicted by one of its officers.[34]

Flores was appealed to the Fifth Circuit where, on September 17, 1984, the appellate court reversed the district court and held that under Texas law the suit was barred by the doctrine of *res judicata*.[35] According to the court,

> Plaintiffs, by acting diligently, could have brought all of their claims in the original suit in the Texas courts. Consequently, a successive suit grounded in the same operative facts cannot now be maintained. Plaintiffs have done no more in their section 1983 action than to advance a new theory of recovery; however, "the assertion of a theory of recovery different from that of the first suit is not enough to state a new cause of action under Texas law."[36]

Under Texas law, said the Fifth Circuit, a different cause of action is not merely a different theory of recovery, but should differ in operative facts and measures of recovery.

In a concurring opinion Circuit Judge Garza disagreed with the majority's interpretation of Texas law, but agreed with the result reached in the case. In his opinion, Flores failed to establish that his section 1983 claim occurred as a result of an official policy, custom, or usage of the school district. In other words plaintiff was not injured as a result of an official policy, custom, or practice of the school district.[37] There is no evidence in the record, he said, to support the conclusions that school district officials had delegated policy-making authority to the teacher, or that it was the district's policy to maintain unsafe conditions in the woodshop, or that the teacher's practices were so persistent and widespread to constitute a custom at the school.[38]

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[34] *Id.* at 623.

[35] Flores v. Edinburg Consol. School District, 741 F.2d 773 (5th Cir. 1984).

[36] *Id.* at 779.

[37] *Id.* at 779-780.

[38] *Id.* at 782.

Hall v. Tawney and the Search for Some Form of Remedy Post-Ingraham

Discipline and control of students is and always has been an integral part of an educational program, for without it teachers cannot teach and students cannot learn. A desirable discipline program not only provides a safe and hazard free environment for teachers and students, but also a proper climate which leads toward student self-direction and maturity. In most jurisdictions corporal punishment always has been available as a legitimate mode of student discipline and control.[39]

Law on corporal punishment has not changed significantly through the years. The Supreme Court ruled for the first time in the 1970s on the legality of corporal punishment, and in two instances upheld the practice. In the more substantive of the two decisions, *Ingraham v. Wright* (1977),[40] the high court ruled that corporal punishment in public schools is not a violation of the eighth amendment's prohibition against cruel and unusual punishment. The Court held that this amendment did not apply to noncriminal matters and the children involved had other recourse, such as a civil suit in the state courts.

In 1980 the Fourth Circuit in *Hall v. Tawney* held that, in some instances, a student can recover damages under section 1983.[41] Unlike *Ingraham* (where in addition to the issue of the legality of corporal punishment there was an issue of procedural punishment), *Hall* involved an issue of substantive due process (*i.e.*, the right to ultimate bodily security) as it applied to corporal punishment. To the Fourth Circuit,

> [t]he existence of this right to ultimate bodily security—the most fundamental aspect of personal privacy—is unmistakably established in our constitutional decisions as an attribute of the ordered liberty that is the concern of substantive due process.[42]

In *Hall* plaintiffs charged that a male teacher spanked their daughter with a homemade rubber paddle and, in an ensuing struggle, he shoved her against a desk, twisted her arm, and pushed her in presence of the school's principal who granted permission for the teacher to spank her. The teacher then spanked the girl again. As a result of the spanking, the girl was treated in a hospital for treatment for injuries to the hips, thighs, and buttocks.

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[39] Vacca & Hudgins, *supra* note 1, at 214.

[40] Ingraham v. Wright, 430 U.S. 651 (1977).

[41] Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980). The Court makes it clear, at the outset, that disciplinary corporal punishment per se does not violate a public school student's substantive due process rights.

[42] *Id.* at 613.

The district court dismissed the action in light of *Ingraham*. Plaintiffs appealed to the Fourth Circuit, which ruled that corporal punishment does not per se violate a child's substantive due process rights. Also said the court, not every violation of state law or criminal assault law will amount to a violation of constitutional right. And, even though the court finally concluded that the student could not prove a claim which would entitle her to relief, it did say that if the force used is so great as to cause severe injury disproportionate to the need to maintain order and is so inspired by malice or sadism that it amounts to brutal and inhumane use of official power literally shocking the conscience, then a violation of substantive due process may be found.[43] One result of this case going into federal court and not to a state court (as seemed to be the appropriate forum post-*Ingraham)* was stated most succinctly by Clague:

> Because Naomi Hall (like the *Ingraham* plaintiffs) chose a federal over a state judicial forum and sought judicial recognition of a new constitutional right to be poured into the empty vessel of the due process clause, her case enters the list in the lively debate over federal judicial activism.[44]

To Clague, a future section 1983 action is possible since this old piece of civil rights law now occupies a position of being "the last possible constitutional check or the 'last resort' left in the wake of the Supreme Court's 1977 decision."[45]

In 1983, a student sought money damages under both section 1983 and the state common law in a corporal punishment case in Virginia. Taking her case into federal district court and not into state court, the plaintiff claimed a deprivation of what she said was a fourteenth amendment right to be free from physical intrusions upon her person. Moreover, she said, there existed a liberty interest in avoiding punishment while in the care of school authorities.

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[43] This discussion of *Hall* is taken directly from Vacca & Hudgins, *supra* note 1 at 217. *See also* Hall, *supra*, at 613.

[44] For an excellent and comprehensive analysis of this issue, see M. Clague, *Hall v. Tawney: Corporal Punishment and Judicial Activism*, 8 West's Educ. L. Rep. 909 (March 24, 1983), at 920.

[45] *Id.* at 909. The 4th Circuit stated that the complaint did not state a cause of action against school officials who were not directly involved in inflicting the punishment, but did state a cause of action on behalf of the pupil against persons directly involved in the paddling. Hall, supra, at 615.

In this case, *Brooks v. School Board of the City of Richmond,*[46] the young student claimed that the deprivation of her rights occurred when her teacher disciplined her by piercing her arm with a straight pin. As a result of that punishment, she claimed both physical and psychological injury, each requiring medical attention.

Counsel for the teacher argued that, even if the facts were true, the student's claim did not constitute a recognizable claim under section 1983. This claim was based upon two grounds. First, since *Ingraham* (1977) the use of corporal punishment in schools did not implicate a constitutionally protected liberty interest of students.[47] Second, the state common law remedies available to plaintiff in this case were fully adequate.

In granting defendant's motion to dismiss, District Judge Warriner made the following pronouncements: To rise to the level of a substantive due process deprivation, the conduct of the disciplinarian must be brutal, inhumane, and conscious-shocking, and the plaintiff must be able to establish that it was the disciplinarian's intent to deprive the plaintiff of his/her constitutionally protected right.[48]

Vail v. Board of Education: A Simple Contract Case and Remedy Under Section 1983.

Beginning in the early 1970s, and especially since 1976, teachers and other professional employees in public school systems have successfully used section 1983 to get their complaints of civil rights violations before the federal bench. As the case law demonstrates, their status in seeking remedy in federal court is not contingent upon holding tenured status in a school system. All that is necessary is for an employee to establish, at least at the prima facie level, that a civil rights violation (constitutional or statutory) is present. And, the burden falls squarely on the aggrieved employee to establish a deprivation cognizable under section 1983.[49]

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[46] Brooks v. School Bd. of the City of Richmond, 569 F. Supp. 1534 (E.D. Va. 1983).

[47] *Id.*

[48] *Id.* For an earlier student discipline decision (a non-corporal punishment case) from District Judge Warriner, wherein he ruled against the plaintiff in a claim not cognizable under 42 U.S.C. § 1983, and thus awarded attorney's fees to prevailing school officials, see Bernstein v. Menard, 557 F. Supp. 90 (E.D. 1982).

[49] As Alexander & Alexander have commented, "Property rights have been recognized when the teacher has tenure or a permanent contract, as provided by the legislature. Also the contractual agreement the employee has with the employer is a property right and cannot be breached during the contract period .... Liberty interests are involved if the employer stigmatizes the employee and jeopardizes one's opportunity for future employment. Stigmatizing the individual's good name or reputation is a violation of a teacher's liberty interest and will require due process of law." K. Alexander & M. Alexander, The Law of Schools, Students, and Teachers (1984), at 306.

Clearly, where school officials are liable under section 1983, the possibilities for remedy are broad. What makes these remedies in employment cases even more significant is that they do not necessarily preclude but may be used as supplementary or in place of state remedies.

In 1983, the Seventh Circuit heard an Illinois case which demonstrates the flexibility of section 1983 and its potential for taking employment issues into a federal forum for which adequate remedy exists in state court. The case is *Vail v. Board of Education.*[50]

Mr. Vail was a supervisor of recreation and physical education at the Statesville Correctional Center in Joliet, Illinois. His family had lived in Joliet for thirteen years, and he had been in his job as supervisor for ten years.

Mr. Vail was contacted by the Paris, Illinois, schools regarding a job opening in that system as head football coach and athletic director. After expressing his interest in the job, initial contract deliberations began between Vail and the Paris school superintendent. All the way through the contract discussions, Mr. Vail expressed to the superintendent and to a search committee that he did not want to give up his position in Joliet unless he could be promised at least two years of employment in Paris. Ultimately, the Paris School Board directed the superintendent to convey an oral offer to Vail, including the board's intent (if Vail signed a one-year written contract) to renew his contract for a second year. Mr. Vail accepted the offer, signed the one-year contract, moved his family to Paris, Illinois, and assumed his new job.

In March of his first year in Paris, Vail was told that his contract would not be renewed. No reasons were given for the board's decision. Vail took his nonrenewal into federal district court. Not claiming any entitlement to tenure by Illinois law, Vail built his entitlement on what he said was the existence of a two-year contract. In his view this gave him more than a mere expectation of continued employment beyond that first year. Vail characterized his situation as a deprivation of a property interest without due process of law as guaranteed by the fourteenth amendment. He sought remedy under section 1983.

In its response to Vail's complaint, the Paris School Board claimed that in Vail's situation Illinois Law prevented the enforcement of a two-year contract since the state statutes preempted any property interest created by an "implied contract." The board stated that Vail possessed no more than a "speculative expectation of continued employment," and was entitled to notice of nonrenewal of his one-year written contract.[51]

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[50] Vail v. Board of Educ., 706 F. 2d 1435 (7th Cir. 1983).

The federal district court agreed with Vail and held that his was a protected property interest in continued employment. The school board, said the court, had acted under color of state law to deprive him of that interest without due process of law. Vail was awarded $19,850.99 in stipulated damages. The Paris Board appealed to the Seventh Circuit.[52]

The Seventh Circuit agreed with the district court. In reaching its decision, the appellate court seemed to focus upon Vail's *detrimental reliance*[53] on the board's promise. To the court, the board's promise of a second year of employment is what induced him to leave his job in Joliet and move his family ninety miles to Paris. The amount in damages was appropriate to remedy the detriment he suffered. In a dissenting opinion, Judge Posner saw the matter as one of simple contract law and one where there was adequate state remedy available to Vail.[54] In Judge Posner's opinion,

> We are witnessing the trivialization of the Constitution. I regret almost more than I can say that my brethern's method of interpreting precedent has led them to take another step on the road whose terminus is the displacement of the whole of state law into the federal courts.[55]

During the last term, the United States Supreme Court, by a vote of 4-4 (Justice Marshall did not participate), affirmed the Seventh Circuit's ruling in Vail. The value of the *Vail* decision is found more in what it indicates about the potential of section 1983 actions than in its possible value as precedent. The *Vail* decision expands the idea of public school employment as a property entitlement even where no tenure status exists; it demonstrates the use of section 1983, even where state remedy exists; and it shows how a matter heretofore taken into a state forum (contract action) might find its way into a federal court as a cognizable constitutional claim.

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[51] *Id.* at 1439. The Board argued that any implied contract would be unenforceable because it arises from an ultra vires board act.

[52] *Id.* at 1440. "A property right is created if the individual has a legitimate claim of entitlement to continued employment as created by state law or by the policies and procedures of the board." Alexander & Alexander, *supra* note 44, at 306. For a recent case on point, *see* Hamilton v. Board of Trustees, 319 S.E.2d 717 (S.C. 1984).

[53] *Id.* This was a bargained for agreement (even though oral in nature) and the Paris School Board received some benefit from the agreement. Also, the board should have realized and expected that the oral promise of a second year of employment would induce a forebearance from Vail, that eventually worked an injustice on him and his family.

[54] *Id.* at 1449. To Circuit Judge Posner, "There is no federal interest in this case, unless the Fourteenth Amendment is thought to invest with federal significance all state action, however unthreatening to the rights we deem fundamental."

[55] *Id.* at 1456. For a more recent case on point, see Goodrich v. Newport News School Board, 743 F.2d 225 (4th Cir. 1984).

Concluding Statement

Over the years, section 1983 has proved to be a flexible and broad scoped statute covering a wide variety of actions of state officials. Given the generally established applicability of this statute to public school boards and school administrators and the expanding nature of section 1983 as demonstrated through the recent developments reviewed in this chapter, it behooves school officials to gain a better understanding of the concepts of civil rights tort law. Clearly, where school officials are held liable under section 1983, the possibilities for remedy are broad.

School officials who once believed that a matter of controversy involving an employee or a student was settled finally and firmly by either an administrative procedure or by a local or state court decision can no longer rely on that belief. Now, or at some point in time subsequent to such a decision, these same officials may find themselves facing a section 1983 action taken in a federal district court by the same employee or student.

During the coming years, as public school officials carry out their legal functions, the potential for becoming involved in section 1983 suits will remain a real possibility. In fact, section 1983 may have the most potential for taking public school officials into court.

As public school law enters the second half of the 1980s, the increasing use of section 1983 as an alternative action is evident. Where a federal court is convinced that a cognizable federal claim exists, public school matters that were once the exclusive province of state tribunals might be litigated instead in a federal forum. There is little doubt that such activity will have a profound impact on the day-to-day practice of public school administration as "routine" matters have the potential to ripen into a federal case.

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The Implications of "Good-Faith" Negotiation Provisions for "Meet and Confer" Laws

Grover H. Baldwin

In 1979, the Kansas Supreme Court ruled that a school board could issue unilateral contracts to the professional staff of the district which included an unnegotiated item that directly affected individual employees. This item was the payment of a fee by any teacher who sought to be released from his contract. This fee was considered to be for liquidated damages. While the item had been a policy of the board as a $200 payment, it was now raised to $500 and was included in the contract. The court held that as negotiations had been completed in accordance with the statute, and as the impasse could not be resolved, the board could take such action unilaterally in the best interests of both the public and the employees[1].

While the issue the court decided was the inclusion of new items in a unilateral contract which had been unaccounted for in the collective bargaining process, the ruling raises questions about the good faith obligation of parties in that process. This is the central issue raised in this paper: What is the good faith requirement within meet and confer laws that must be met in order to satisfy the statutes and yet act in the best interest of the public and the employees? This issue is important; the answer can serve as a guide to school boards in their efforts to meet the statutory requirements of good faith negotiations. As state courts have come to rely on NLRB and appellate court rulings in rendering their local decisions, we will examine the common law to discern these requirements.

The Duty to Bargain

Good faith is an elusive term. It is difficult to define with any degree of accuracy as subjective judgment is used when trying to determine whether an individual, or board, acts in good faith in fulfilling its obligations. For boards of education or private companies, the courts and the NLRB have ruled that mere words, and in some cases actions, are not enough to insure the fulfillment of the responsibility for good faith in the collective negotiations process. On that basis, tests of the viability of the good faith of both parties have been established. These include the differences between surface, hard, reasonable bargaining in maintaining negotiations positions; the use of information as part of the process, the withdrawal of tentatively accepted proposals; and the determination and effects of impasse on unilateral changes.

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[1] Riley County Educ. Ass'n. v. Unified School Dist. No. 378, 592 P.2d. 87 Kan. (1979).

The Supreme Court, in dealing with the question of tests of good faith, stated

> (the) performance of the duty to bargain requires more than a willingness to enter ... The duty to bargain collectively, implicit in the Wagner Act as introduced in Congress, was made express by the insertion of the fifth employer unfair labor practice accompanied by the explanation of the purpose and meaning of the phrase "bargain collectively in a good faith effort to reach an agreement." This understanding of the duty to bargain collectively has been accepted and applied throughout the administration of the Wagner Act by the NLRB and the Courts of Appeal.[2]

We first turn to the issue of the bargaining strategies used by parties in collective negotiations. These fall into three distinctly different, yet entwined, categories which include surface bargaining, hard bargaining, and reasonable bargaining. While surface bargaining appears to be hard bargaining, it is a sham that provides an opportunity for either side to merely follow the process and move to the next stage in negotiations until impasse is declared. By going through the motions, the formal obligations are fulfilled, but without agreement and a settled contract. The effect is to weaken the collective negotiations process by weighting the balance in favor of one party, typically management.[3]

The Ninth Circuit examined these realities and found that surface bargaining can look so much like hard bargaining that it is difficult to detect surface bargaining.[4] In examining the claim of bad-faith negotiations, the Fifth Circuit held that while employers need not make concessions, or yield on positions merely to reach an agreement, bad faith is prohibited even where done with sophistication and finesse. It takes more than mere "surface bargaining" or "shadow boxing to a draw", or "giving the Union the runaround while purporting to be meeting with the Union for purpose of collective bargaining."[5] The use of surface bargaining is difficult, but not impossible, to detect. Delay in bargaining sessions, withdrawal of proposals tentatively agreed upon, meager offers of counterproposals, and offers that may lead to the ineffectiveness of the union, or abrogation of its responsibilities, are all items that have been held to be indications of surface bargaining. Likewise, tactics that include sending representatives with no authority to bargain and breaking commitments made at the table are evidence of a lack of good faith.[6]

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[2] NLRB v. American Nat'l. Ins. Co., 343 U.S. 395, 402-403 (1952).

[3] Cox, *Duty to Bargain,* 71 Harv. L. Rev. 1401-1442, (1958).

[4] Queen Mary Restaurants Corp. v. NLRB, 560 F.2d 403 (9th Cir. 1977).

The NLRB and the courts have steadfastly ruled that hard bargaining, the insistence of a position on the part of one party for justifiable reasons, is a legitimate part of the negotiating process and is not to be confused with surface bargaining. The courts have held that the determination of whether the bargaining process is impermissible surface bargaining or permissible hard bargaining involves an examination of each negotiating situation based on a complete set of facts which are open to various, and different, interpretations.[7]

The Fifth Circuit held that insistence on a particular bargaining position well founded and sincerely held, and not mere "window dressing," is not in itself a refusal to bargain in good faith.[8] The issue, in this case, was the insistence on the part of the employer to a management rights clause, which, when combined with no-strike and no arbitration clauses, lead to an allegation of unfair labor practice within the scope of good faith negotiations. The union had made various concessions throughout the negotiating process, while management had not moved from its initial position. The court held that the company did not have to move even when the other side made concessions in the hope that the company would follow suit. The court ruled that the company could adopt this tactic as management had demonstrated that it sincerely believed in its position. In this particular case, the insistence of management on its position was supported by evidence of its deep held conviction, and was not a whimsical idea on its part.

While the management position may be strong, and while it appears to be intransigent and possibly in bad faith, the ultimate test applied by the courts in reviewing the NLRB rulings has been the disposition and posture of both parties as they face the process of reaching the final agreement. This posture presupposes that neither side will adopt and maintain a position of "take it or leave it" that would be detrimental to the negotiating process. The intention of the NLRA was to permit open and fair-minded attempts at reaching a settlement and maintaining the harmonious aspects of industrial peace. This could be accomplished only via honest and good faith collective bargaining.[9]

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[5] NLRB v. Herman Sausage, 275 F.2d 229 (5th Cir. 1960).

[6] NLRB v. A. E. Nettleson, Co., 241 F.2d 130 (2d Cir. 1957); NLRB v. Shannon, 208 F.2d 545 (9th Cir. 1953); and NLRB v. National Shoes, Inc., 208 F.2d 688 (9th Cir. 1953).

[7] Seattle-First National Bank v. NLRB, 638 F.2d 1221 (9th Cir. 1981).

[8] Chevron Oil Co., Standard Oil Co. of Texas Div. v. NLRB, 442 F.2d 1067 (5th Cir. 1971).

The courts look askance at unilateral actions of the employer following the impasse declaration that may signal a lack of good faith. Of note is the *NLRB v. Katz* decision, where management's proposal called for a three-year contract with a $7.50 per week increase followed by additional increases of $5 a week at the end of the first and second years of the agreement.[10] Following the rejection of the offer by the union, the company unilaterally announced a new system of automatic wage increases which included a $5 raise every three weeks up to a stipulated ceiling, a $5 raise every six months for employees earning between $75 and $90 per week, and a merit review every six months for employees earning over $90 per week. The court held that this was a violation of good faith provisions as the wage system the company put in place unilaterally was more generous than had been offered to, and rejected by, the union. The court further indicated that, while the employer need not lead with the best offer, management has no right, following the conclusion of unsuccessful negotiations, to grant increases larger than were offered at the bargaining table as it is necessarily inconsistent with the sincere desire to conclude an agreement with the union and would be indicative of surface bargaining.

The question still arises of whether a position may be so intransigent as to appear to be a hard bargaining position, and yet be that of surface bargaining. What determines the difference? Part of the answer lies in the actual offer of management and the reasonableness of that offer in light of current economic and social surroundings. For instance, in *K-Mart Corp. v. NLRB*, the Ninth Circuit held that the company had violated good faith by offering a contract with a meager pay package.[11] By offering this proposal in a period of double-digit inflation and, after a great deal of time and delay, the effect was to offer no real wage increase. Rather, the offer, according to the court, could be interpreted as a wage decrease. The conclusion of the court was that this type of offer was indication enough that the company had not negotiated seriously, and hence not in good faith.

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[9] NLRB v. Insurance Agents Int'l. Union, 361 U.S. 395 (1952).
[10] NLRB v. Katz, 369 U.S. 736 (1962).
[11] K-Mart Corp. v. NLRB, 626 F.2d 704 (9th Cir. 1980).

Meager offers, or offers that are patently disadvantageous to the union, are evidence of a lack of good faith bargaining on the part of management. While hard bargaining does not preclude the insistence of a singular position that can be supported by evidence, the courts have held that maintenance of positions that indicate less than good faith will not be tolerated. In *NLRB v. Blevins Popcorn Co.*, the court found that a company that insists on terms which "no self-respecting union" could accept, is not fulfilling its obligation to bargain in good faith.[12] Such a bargaining position may include a proposal, or set of proposals, that the other side may find unacceptable, but may not clearly show an intent on the part of management to enter a contract only on its terms.[13]

The Ninth Circuit examined the hard bargaining positions of management when a strong management rights package was demanded by the employer.[14] Even though supported by evidence of economic justification the court found that the proposal worked to the detriment of the union and forced the union to abrogate its rights as representative of the employees. Such a proposal, even when management presented evidence to support its proposal, was found to be inconsistent with the obligation to bargain in good faith.

Information and Negotiations

The apparent key to success in determining hard or reasonable bargaining from surface bargaining flows from the ability of the management team to demonstrate its willingness to negotiate, explain, and support its position in such a manner as to support its claims of negotiations in good faith.[15] Part of this success is through the sharing of information with the other side. This information takes two forms. First, there is the information needed to successfully complete negotiations and permit reasonableness on the union side in preparing its proposals. Second, there is the information offered by management in support of its contentions and proposals. Of the two types of information, the courts have held that the second is more important in determining the good faith intentions of the management.

The premier case for this issue is the *NLRB v. Truitt Manufacturing Co.*[16] The question before the court was whether the company had bargained in good faith when it presented a modest proposal for wage increases. The company stated it could not afford additional wage increases due to economic reasons, but refused to meet union requests to produce information and evidence to substantiate its claims. The union insisted that such information was vital and pertinent to the process to determine whether or not the union should continue to press for its wage demands, or whether they should be modified in light of the financial standing and profits of Truitt. The company steadfastly refused to comply with the requests, stating that the information was not pertinent and that union had no right to it.

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[12] NLRB v. Blevins Popcorn Co., 659 F.2d 1173 (D.C. Cir 1981).

[13] Pease Co. v. NLRB, 666 F.2d 1044 (6th Cir. 1981), *cert. denied,* 456 U.S. 974 (1981).

[14] NLRB v. Mar-Len Cabinet, Inc., 659 F.2d 995 (9th Cir. 1981).

[15] Pittsburgh-Des Moines Corp. v. NLRB, 663 F.2d 956 (9th Cir. 1981).

[16] NLRB v. Truitt Manufacturing Co., 351 U.S. 149 (1956).

The NLRB ruled that the information was relevant to the negotiating process and that the company needed to provide reasonable proof of its claims. The Supreme Court held for the NLRB, indicating that, while the Congress did not intend for the NLRA to compel agreement, it did require bargaining in the hope of concluding an agreement and required both parties to make every reasonable effort to reach that agreement. The Court indicated that each case involving the demand for disclosure of proof to substantiate the bargaining position must be examined on a case-by-case basis to determine the specific circumstances under which the demand for information relevant to the bargaining process had been met or not.

Truitt thus becomes a standard for the determination of good faith negotiations where information is concerned. The courts of appeal have dealt with the information issue and have used the *Truitt* decision to formulate additional requirements regarding the providing of information by management to the employee representatives for good faith negotiations.

In *NLRB v. Western Wirebound Box Co.* the company abandoned its position that a cut in wages was needed (though unsubstantiated) in adopting a position that provided for continuing wages at the current level and even providing for a small increase.[17] The company claimed that the wage cut, or lack of increase, was needed to permit it to remain in existence and not operate at a loss or threaten its existence. The union requested information only regarding the productivity and production costs of the company. The court, relying on *Truitt*, indicated that an employer who insists that competitive disadvantage does not allow him to give in to a union wage demand, has to substantiate that claim. The court went further and indicated that failure to produce supporting data constituted a failure of good faith negotiations unless (1) the union made no request for such data or (2) such data could not be supplied. Further, the court stated that

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[17] NLRB v. Western Wirebound Box Co., 356 F.2d 88 (9th Cir. 1966).

> the duty to substantiate a claim upon request, established by *Truitt,* is not to be defeated because the union fails to ask for the precise kind of information which is relevant to the claim, or because the company, although capable of supplying relevant information, is unable to supply other relevant or irrelevant data specifically requested by the union.[18]

The Supreme Court further examined the posture of collective negotiations in the *Acme Industrial* case.[19] It found that good faith negotiations demands that both sides be willing to do whatever is reasonable to reach an agreement, and that artificial barriers should not be constructed. Thus, the need for information, upon request by the union, is a part of the negotiating process. This information may be either of a precise nature to substantiate specific claims, or of a general nature that can be used to derive the status of the management's position relevant to the claims involved in proposals and counterproposals.

The need to pursue the request for information became an issue in *Pacific Grinding Wheel Co.* where the Ninth Circuit held that, if the union never pursued the claim for such information, the company had not violated good faith efforts.[20] While the company needed to provide relevant information, the court also declared that it was incumbent upon the union to ask for such information. Failure to request such information, and the company's failure to produce it, was not to be used as a basis for an allegation of bad faith.

The Ninth Circuit went further in delineating the bounds of company refusal to grant a request for information. In *NLRB v. Associated General Contractors* the court held that, while the duty to bargain in good faith may be violated by the employer's refusal to grant information to the union, the company may withhold such information if there are good reasons for nondisclosure.[21] These reasons included some indication that there was a need for secrecy of production costs and financial information as it may affect the company's status in the overall economic environment in which it operated.

Lastly, in dealing with the need for information regarding proposals and counterproposals of either side, the First Circuit set a liberal discovery-type standard.[22] In *Soule Glass and Glazing Co. v. NLRB,* it was held that:

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[18] *Id.* at 92.

[19] NLRB v. Acme Indus. Co., 385 U.S. 432 (1967).

[20] Pacific Grinding Wheel Co. v. NLRB, 572 F.2d 1343 (9th Cir. 1978).

[21] NLRB v. Associated Gen. Contractors, 633 F.2d 766 (9th Cir. 1980).

[22] Soule Glass and Glazing Co. v. NLRB, 632 F.2d 1055 (1st Cir. 1981).

> Where the requested information concerns wages and related information for employees in the bargaining unit, the information is presumptively relevant to the bargainable issues . . . and unless the employer comes forward with an effective rebuttal as to the lack of relevance or provide(s) adequate reasons why he cannot, in good faith, supply the information, . . . the union need make no showing of relevance.[23]

However, this discovery-type procedure does have some safeguards for the employer. Employer positions for nonsubmission of information may be based on the claim of justifiable fear of violence or harassment of employees. However, information about employees outside the bargaining units including data regarding profits, production figures, wage surveys of competitors, and the like, may also be requested. In the latter instances, the union must show the need for such evidence based on the relevance of the information to its preparation of negotiating proposals and substantiation of its claims.

Proposals and Impasse

Several issues are raised under this area applicable to good faith negotiations, including (1) the withdrawal of proposals which are tentatively accepted by both sides, (2) the duration that a proposal is in effect, as well as (3) the impact of the proposal's status at impasse.

While it has been held that the withdrawal of a proposal tentatively accepted is an unfair labor practice and evidence of a lack of good faith within the collective bargaining process, the courts are prone to look at the conditions under which the proposal was withdrawn, prior to declaring a lack of good faith.[24]

The use of the "good faith" reasoning on the part of the Eleventh Circuit provides evidence of the court's willingness to permit the withdrawal of a tentatively accepted proposal.[25] Here the company withdrew a proposal which led to the allegation of bad faith negotiations. The union had tentatively agreed upon the proposal as part of the negotiations package and the company rescinded the offer. The court found that the withdrawal of proposals or tentative agreements does not in and of itself, establish bad faith negotiations. However, there must be a good cause or it will be evidence of a lack of good faith bargaining. The court also sustained the withdrawal of proposals prior to final total acceptance of the negotiated agreement where concessions have been made on other issues that warrant a change in previously accepted proposals. However, it should be noted that these conditions are based on the mutual agreement of both parties.

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[23] *Id.* at 1093.

[24] American Seating of Mississippi v. NLRB, 424 F.2d 106 (5th Cir. 1970).

[25] The Mead Corp. v. NLRB, 697 F.2d 1013 (11th Cir. 1983).

Yet, how long does an offer stand in negotiations? In examining the issue of whether an unconditional offer remains open to acceptance after the other party has rejected the offer or submitted a counterproposal, the Eighth Circuit held that the proposal remained open to acceptance even after rejection by the union.[26] The court held that, even where the original offer had been rejected, where a strike had ensued, a condition of impasse had existed, the union accepted the initial offer to resolve the impasse condition, and the company reneged — claiming that the union's rejection had canceled the offer — the company was in violation of good faith negotiations.

The court held that the common law practice of negating a proposal through either rejection or counteroffer did not hold true in collective bargaining. There is a give and take in collective negotiations that must be kept. Thus, the court indicated that there was no expressed time limit for the acceptance or rejection of the proposal that would permit the company to withdraw the proposal. This time frame could have been made part of the proposal. Such a requirement was not made here and thus there was a lack of good faith. While the court did agree with the NLRB policy that the proposal may be accepted within a reasonable time period, it held that, unless the offer was made contingent upon some conditions subsequent to the offer or was subject to intervening circumstances which made it unfair to hold the offeror to his bargain, the proposal stood in good stead unless expressly withdrawn.

The Ninth Circuit found that impasse might be a good cause under which a proposal could be considered withdrawn.[27] However, if no impasse existed, then the company's unilateral withdrawal of its last wage offer was an independent action, violative of its duty to bargain. In addition, the court examined the issue of the timing of changes in negotiations and saw that this was all important in considering good faith procedures. In this case, while the proposal was withdrawn and the company turned to a more regressive wage proposal, the court found that in an of itself such changes were not evidence of bad faith as long as a hard bargaining position had been maintained throughout negotiations. However, if the changes were a reaction to a strike by employees, a union rejection to a company proposal, a lowering of the proposal, or raising issues not contemplated before the impasse occurred, such would be evidence of bad faith.

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[26] Pepsi-Cola Bottling Co. of Mason City, Iowa v. NLRB, 659 F.2d 87 (8th Cir. 1981).

[27] Pacific Grinding Wheel Co. v. NLRB, 572 F.2d 1343 (9th Cir. 1978).

The effect that impasse has on the good faith practices of both parties is found in a series of cases that seek to define the responsibilities of both parties in the proposal and counterproposal stage, and the issuance of unilateral changes in employment conditions.

In *Katz,* the Supreme Court ruled that unilateral changes in the conditions of employment under negotiation was a violation of good faith portion under the NLRA as it circumvents the duty to negotiate in a responsible fashion. Subsequent rulings by circuit courts have provided a loosening of that test. In *American Federation of Television and Radio Artists v. NLRB,* while recognizing the duty to bargain in good faith and not make unilateral changes while in the process of negotiating, the court upheld the NLRB principle that, upon reaching impasse, an employer can make changes unilaterally that are reasonably tied to pre-impasse offers.[28] The question remains, when do the parties have to reach a stage of impasse?

To answer this question, we turn to the Fifth Circuit ruling in the *Gulf States* case.[29] In *Gulf States,* the court held that an impasse exists that makes further discussion futile. However, the court also observed that an impasse is broken by any action that can bring about fruitful discussion, even if no agreement is reached. Such indications of possibility include additional bargaining concessions, even after impasse procedures have been complete, and the passage of time. That impasse exists within the context of labor negotiations is a real possibility. The efforts of the NLRB and the courts have been to discern the sincerity of the impasse, the justification of the positions of the parties involved, and finally, the contents of the unilateral contracts issued by the employer in hopes of overcoming the impasse and returning to normal business operations for possible good faith violations.

The recognition and declaration of impasse are crucial to the actions of employers in the establishment of unilateral contract provisions. If, after a finding of good faith, the indication is that impasse has been reached, then such changes of proposals might be warranted. Further, the nature of the unilateral provisions is not fixed. Some courts have determined that the employer may go beyond the last proposal and unilaterally include items not previously considered. Other courts have ruled that the nature of unilateral decisions following impasse must be limited to no more than the proposals that existed at the time of impasse or such action will be considered a violation of good faith.

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[28] American Fed'n of Television and Radio Artists v. NLRB, 395 F.2d 622 (D.C. Cir. 1968).

[29] Gulf States Mfg., Inc. v. NLRB, 704 F.2d 1390 (5th Cir. 1980).

Even at that, the courts have examined the changes for the unilateral imposition of mandatory subjects versus permissive subjects. Where bargaining issues are mandatory, the courts sustain the union's position of unfair labor practice or negotiating in bad faith. Within the context of permissive items, however, the courts permit such unilateral changes even if not discussed or negotiated prior to the impasse.[30]

As stated at the outset, the measurement of good faith intentions on the part of either party is a difficult thing to assess. To determine the real intentions of either side in the collective negotiating process calls upon the NLRB and the courts to make subjective judgments as to the nature and extent of the parties' true beliefs and desires. Given the conditions outlined above used as tests for good faith and the need for an open mind and sincere desire to reach agreement, what are the implications for those in public sector negotiations who meet and confer on mandatory issues regarding wages, hours, and terms and conditions of employment for public school personnel?

The Schools and Good Faith Negotiations

Public sector negotiation laws range from permitting a teacher to approach the board with requests to hard bargaining laws with the right to strike as a legal economic weapon. Nevertheless, these laws are not directly tied to the NLRA and the decisions of the NLRB in administering the Act. Most states have fashioned their public sector negotiations laws loosely after the NLRA, even those utilizing "meet and confer" principles. The link between the NLRA, NLRB rulings, and federal court decisions then is the willingness of the state appellate courts to apply these findings in support of their own rulings.

Such applications appear to be best stated in the recent *Cumberland Valley School District* case.[31] During the process of negotiations the contract of the preceding year had expired and the district stopped payment of medical, hospitalization, and life insurance premiums, as well as certain tuition reimbursement costs, all of which had been provided under the expired contract. The Pennsylvania Supreme Court held that the district violated good faith bargaining because fringe benefits were wages as defined under the law and could not be unilaterally withdrawn. The court found that this unilateral change by the district was a coercive effort to force a settlement on the association. More instructive was the rationale of the court regarding the use of federal court rulings in rendering its decision. The court stated

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[30] Newspaper Printing Co. v. NLRB, 692 F.2d 615 (6th Cir. 1982).
[31] *In re* Cumberland Valley School Dist. 394 A.2d 946 (Pa. 1978).

> Section 701 of Act 195 which defines collective bargaining is substantially identical to section 151 of the NLRA. In the past, when a provision of Act 195 is similar to the NLRA, we (the judges) have looked to federal decisions for guidance.[32]

The court then relied on the *Katz* decision to find that the district had overstepped its bounds in the unilateral changes and had not acted in good faith.

The issue of good faith negotiations, and the concomitant responsibility to make proposals and counterproposals but not concessions, was further dealt with in Massachusetts. Relying on the decisions found in *Insurance Agents, Truitt,* and *Pittsburgh-Des Moines,* the Massachusetts court held that the duty to bargain includes the need to meet and negotiate and to do so in good faith.[33] Good faith for the court was a condition which includes an open and fair mind and a sincere effort to reach a common ground. Further, the court held that there can be no unilateral action on the part of the school board on matters that are mandatorily negotiable where there is no impasse, and no impasse can exist where it has been shown that the impasse is due to the failure on the part of one of the parties to negotiate in good faith.

Other states have examined the responsibilities of both parties in public sector negotiations to meet the responsibility of bargaining in good faith. The need for good faith negotiations, and the failure through good faith efforts to reach an agreement, is paramount in declaring that an impasse exists which will permit the district to unilaterally change conditions of employment. In *Board of Education v. Hawaii Public Employment Relations Board,* the Supreme Court of Hawaii found that both sides, by statute, had to negotiate in good faith.[34] Further the court noted that:

> In our opinion the law on collective bargaining in public employment, without ambiguity, clearly requires both the public employer and the exclusive representative of the public employees to

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[32] *Id.* at 950.

[33] School Comm. of Newton v. Labor Rels. Comm'n., 447 N.E.2d 1201 (Mass. 1983).

[34] Board of Educ. v. Hawaii Pub. Employment Rels. Bd., 528 P.2d 809 (Hawaii 1974).

> bargain (negotiate) collectively in good faith. . . . Thus, the proper construction . . . is that "impasse" means failure of a public employer and the exclusive representative to achieve agreement in the course of good faith negotiations (bargaining).[35]

This decision parallels the *Pacific Grinding Wheel* decision reviewed above.

While the Hawaii decision dealt with a statute that permitted strikes by teachers for economic pressure to balance the power of the two sides, the issue of good faith negotiations has also been raised within the specter of "meet and confer" laws, where there is a lack of balance of power between the two parties. The question arose in *NEA-Shawnee Mission v. Board of Education* about the meaning of "meet and confer" as compared to "negotiate" or "bargain."[36] The school board claimed that the law specified "meet and confer" which permitted it to seek advice, but permitted it to render a decision that it desired. The association claimed that "meet and confer," within the context of the law that included the effort to reach an agreement in good faith, meant more than merely having input in the decision making process.

The Kansas Supreme Court ruled in favor of the association on this issue and cast the term "meet and confer" in the same light, and with the same responsibilities, as the NLRA requirement to collectively bargain in good faith. In addition, the court held that the agreement reached, once ratified as required by the statute, becomes binding on both parties for the duration of the contract, and is more than a mere memorandum of understanding that the board may choose to follow. Thus, state courts are prone to follow the lead of federal courts in defining the scope of good faith bargaining and applying the same, or similar, standards to "meet and confer" laws within their states.

If parties to public sector negotiations have the obligation to negotiate in good faith, and state courts are applying the NLRB and federal-court rulings to their decisions, then the private sector cases and issues reviewed above may be made applicable to the public sector negotiating process. Thus, the standards of surface versus hard versus reasonable bargaining have application to public sector negotiations and the indicators of good faith negotiations reviewed earlier can be used in determining the intent of the parties to bargain in good faith.

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[35] *Id.* at 811.

[36] NEA-Shawnee Mission v. Board of Educ., 512 P.2d 426 (Kan. 1973).

The issue of providing information both in substantiation of proposals and counterproposals, and in the performance of administration of the contract, warrants our attention. In California and Connecticut, meet and confer type negotiations laws are in effect with the employees' representative prohibited from bringing concerted economic pressure (a strike) against the employer to effect a solution. In addition, in each state, the provision for binding arbitration is missing, with only written recommendations of an advisory nature used to resolve impasse situations.

In *NLRB v. Leland Stanford Junior University,* the Ninth Circuit applied the findings of *Detroit Edison Co. v. NLRB,* with additional federal court rulings *(General Electric Co. v. NLRB, P. R. Mallory & Co. v. NLRB,* and *NLRB v. Acme Industrial Co.),* in rendering its decision for the employees' representative regarding the need for the employer to provide information to the union relevant to the collective bargaining duties of the union.[37] In addition, the court found that a broad test is applied to determine the extent, and relevance, of the information needed. In this case, the information sought dealt with non-union employees and the burden of proof of the relevance of the information was placed squarely on the shoulders of the union.

Using the discovery-type standard enunciated in *Acme Industrial* and applying the standard established in the *San Diego Newspaper Guild* case, the court held that the union must show how the information would be useful in collective negotiations and not be just a whimsical notion on its part.[38] Yet the court did not require a burdensome showing which would defeat the liberal discovery standard of relevancy. Hence the solution appears to be to require the union to produce an initial, but not overwhelming, set of evidence to demonstrate the relevancy of the information. Thus, the stage is set for boards of education to provide information demonstrating that they are meeting the good faith standard of negotiations.

The need to provide information to the union so that it may negotiate in good faith has been established. With *West Hartford Bd. of Ed. v. State Bd. of Labor,* the Supreme Court of Connecticut announced the expansion of good faith obligations on the part of the board to include the provision of information to the union in its efforts to administer and police the contract.[39] The court found that the state statute for public sector negotiations was essentially patterned after the NLRA and thus the court reasoned it could utilize the federal judicial interpretation of the Act in reaching its decision. The court relied on the *Detroit Edison Co., Acme Industrial,* and *Truitt* decisions to hold that the school board must provide relevant information needed by the representative for the proper performance of his duties including administration and policing of the contract.

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[37] NLRB v. Leland Stanford Junior Univ., 715 F.2d 473 (9th Cir. 1983). *See also* Detroit Edison Co. v. NLRB 440 U.S. 301 (1979); General Electric Co. v. NLRB, 446 F.2d 1177, (6th Cir. 1972); P. R. Mallory & Co. v. NLRB, 411 F.2d 948 (7th Cir. 1969) *rehearing denied* July, 1969; and NLRB v. Acme Industrial Co., 385 U.S. 432 (1967).

[38] San Diego Newspaper Guild v. NLRB, 548 F.2d 863 (9th Cir. 1977).

[39] West Hartford Bd. of Educ. v. State Board of Labor, 460 A.2d 1255 (Conn. 1983).

Thus, we see that, not only are the courts willing to follow federal court decisions and make them applicable to public sector situations, they are willing to apply the standards found in private sector negotiations to public sector negotiations, including those situations under "meet and confer" laws.

Good Faith and Impasse

While the public sector employer must follow the dictates of good faith negotiations, he also has an obligation to maintain services and provide for the education of the students within the district. Therefore, states have provided public employee negotiations laws with impasse procedures which, when followed and completed, permit boards of education to take action to institute necessary steps to continue services they are to provide. Specifically then, what are the obligations of the public sector employer to the employees regarding good faith negotiations and where do unilateral actions mesh with good faith negotiations?

It has been held that public employers, like their private sector counterparts, are not free to unilaterally change the conditions of employment during the life of a valid contract.[40] This includes the continuance of past practices that the board considered to be a managerial right. In this instant case, the state court held that the policy mandating physical examinations, and the past practice of reimbursement for the cost of those examinations, was a mandatorily negotiable item and, even in the absence of a contract provision on which to base its action, the board had overstepped its bounds by unilaterally withdrawing the reimbursement.

However, the Alaska Supreme Court distinguished between mandatory and permissive items of negotiations in permitting the University of Alaska to unilaterally change work rules that affected the working conditions of employees.[41] The finding of no bad faith negotiations, or of an unfair labor practice, occurred as the strict reading of the statute found that only salary, fringe benefits, number of hours worked, and amount of leave time were mandatorily negotiable items. Thus, the work rules, being permissive items of negotiations, could be unilaterally changed.

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[40] BOCES v. New York Pub. Employment Rels. Board, 82 A.D.2d 691 (N.Y. 1981).

[41] Alaska Commun. College Teachers v. University of Alaska, 669 P.2d 1299 (Alaska 1983).

The court also examined the issue of hard versus surface bargaining regarding the failure on the part of the board of regents to ratify the tentative contract. This had been a ground rule within the negotiations process and, when the board failed to ratify the tentative agreement, the employees' representative charged bad faith. In looking at the specifics of the situation, the court found that the failure to ratify was due to the new president who, entering the process after the tentative agreement had been reached, advised against ratification. The court ruled that this was not a bad-faith tactic meant to forestall the negotiating process or to evidence surface bargaining.

Consideration has been given to unilateral changes in working conditions and the implications of good faith negotiations in Maine. Maine's "meet and confer" law was applied to the actions of the Board of Directors of Maine School Administrative District No. 8.[42] Here the state court found that the board had violated its good faith responsibilities by changing the terms and conditions of employment unilaterally after the expiration of the contract, but prior to the exhaustion of impasse procedures. Holding that the board had overstepped its bounds, the court held that an employer may not unilaterally alter the terms and conditions of employment after the expiration of a contract. This rule, the court held, was based on the principle that unilateral changes of the contract are in "contravention of the duty to bargain in good faith."

In a footnote to that opinion, the court indicated that the generally accepted exceptions to this rule included: (1) impasse, (2) union waiver of its right to insist on negotiating over the alteration, and (3) changes required by law.[43]

Reaching impasse appears to be a turning point on which employers may make the changes necessary to continue the operation of the schools. In the *Modesto* decision, the court examined the extent to which unilateral changes could be made following the existence of impasse conditions.[44] While holding that unilateral changes were illegal and signs of bad-faith negotiations, where the public employer had failed to notify and negotiate with the exclusive representative of the employees, and where the changes had occurred prior to reaching impasse, the court declared that upon reaching impasse the school board could make the changes it desired, but within certain limits.

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[42] Lane v. Board of Directors of Maine School Administrative Dist. No. 8, 447 A.2d 806 (Me. 1982).

[43] *Id.* at 810

[44] Public Employment Rels. Bd. v. Modesto City Schools Dist., 186 Cal. Rptr. 634 (Cal. Ct. App. 1982).

Following the rulings in *Katz* and the *American Federation of Television and Radio Artists,* the California court held that, after impasse is reached, the employer may take unilateral action to implement the last offer the union has rejected. The offer need not be identical to the last offer, but must be reasonably close to the pre-impasse proposal. This includes the last offer, but no more than the last offer. Thus, the standards of good faith apply even in impasse situations and the indications of federal courts as to the practices applicable within the private sector provide guidance to the public sector employers.

One last issue is raised about public school impasse conditions. In addition to not issuing unilateral changes that exceed the last offer of the employer as indicated above, the Indiana Supreme Court examined the meaning of "status quo" as it applied to negotiations where no contract for the succeeding year had been reached.[45]

The state statute provided that, in the absence of an agreement 14 days prior to the budget submission date, the parties had to maintain the status quo and the employer could issue tentative contracts and submit a budget based on the existing terms and conditions of employment. The school board, failing to reach a successor agreement for the 1978-1979 school year, issued payroll checks in the amount of the salary teachers had received during the 1977-1978 contract. The association contended that this was a unilateral change from past practice and a failure to maintain the status quo that would have provided for movement of individual teacher salaries up one "step," and where applicable, from one "lane" to the next, in accordance with the existing, uncontested contract.

The court ruled that "status quo" was to be defined as the "existing state of things at any given date . . . the actual, peaceable, uncontested status which preceded the pending controversy."[46] This definition, combined with evidence of past practice of movement of individual teacher salaries across "steps" and "lanes" as appropriate, led the court to hold for the association and found the school board in violation of good-faith negotiations; the issuance of 1977-1978 salaries without movement was viewed as a means to coerce the association to a settlement. Thus, the stage is set for the continuance of benefits and salaries, including increases in accord with the last existing contract, even during a period of impasse.

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[45] Indiana Educ. Employment Relations Bd. v. Mill Creek Classroom Teachers Ass'n., 456 N.E.2d 709 (Ind. 1983).

[46] *Id.* at 712.

Summary

In reviewing the foregoing discussion of good faith requirements under "meet and confer" laws for public sector negotiations, there are implications to be drawn and applied to school district management decisions regarding negotiations.

First, it appears that state courts have taken the opportunity in rendering their decisions to examine NLRB and federal court rulings that pertain to the private sector. While this has meaning for the rulings of the state courts, it also causes private sector negotiating strategies and reasoning to be applied to public sector negotiations. The message for school boards of education, as well as private negotiators and attorneys who advise these boards, is for their need to keep abreast of both public and private sector rulings.

Second, with the rulings that apply NLRA provisions to public schools, boards must be cognizant of their activities and strategies within the context of good-faith negotiations. While they need not agree to any specific proposal or make a concession, boards need to provide ample evidence that they are reasonable in their positions, even if it is a matter of hard bargaining. Anything that gives the appearance of surface bargaining, or merely going through the motions to satisfy the statutory requirements so that the boards can reach impasse and make unilateral changes, will be suspect and challenged and may well lead to a finding of bad-faith negotiations. To maintain a position of hard bargaining is permissible, contingent on demonstrating that every effort is being made to reach an agreement and that the position is not one of "take it or leave it."

Third, indications from both private and public sector rulings of what constitutes good faith have been expanded beyond the initial NLRA statutory requirement. These now include the need to provide information to substantiate proposals, counterproposals, and claims by management, as well as providing information to employee representatives to permit the fulfillment of responsibilities to administer and police the contract. The intent here is to provide the basis for reasonableness of proposals by the employee representative relative to the exact financial conditions and status of the employer. Such information may include items of the status of both union and nonunion members where the information has been shown initially to be relevant to the negotiating process.

Regarding the withdrawal of proposals tentatively agreed upon, in the private sector this is a violation of good faith negotiations absent good cause to the contrary. In public sector negotiations, while the same holds true, there is an additional prospect for withdrawal of tentatively agreed-upon proposals. This, as indicated in the *Alaska Community College* case, means where a ground rule has been accepted by both sides that includes the ratification by the full board or membership of the union, failure to ratify would be good cause for withdrawal. In addition, the specter of bad faith raised here is the amount of authority given the negotiators to make and accept proposals that would be binding on the board.

As seen in the cases reviewed, stalling tactics by unexplained delays and postponement, sending negotiators to the table with no authority to do more than argue and listen, and breaking commitments made by company representatives, are all indications of a lack of good-faith negotiations. Again, caution is needed on the part of public school management to provide evidence of the reasonableness of its position in establishing its good faith in negotiations. Further, as indicated by private sector decisions, the withdrawal of a proposal once made must be explicitly accomplished and may be accepted if not withdrawn.

In dealing with impasse and unilateral changes in employment conditions, we began by reviewing the *Riley County* case dealing with unilateral changes following the completion of impasse procedures as they might lead to suspicions of surface bargaining. While the *Riley* decision currently holds in Kansas, decisions of other state courts have yielded different conditions regarding the imposition of unilateral contract changes. These include the issuance of contracts containing terms that do not exceed the last offer rejected by the employee representative, or at least a close approximation of that offer. Further, the need for the firm establishment of impasse, reached via good-faith negotiations on the part of both parties, is necessary to warrant unilateral action on the part of the board.

On balance, the efforts by the courts to provide the atmosphere for good faith negotiations via application of private sector standards to the public sector is a trend worth watching for those who negotiate in this arena.

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An Instrument for a Legal Review of Public School Curriculum Policies and Procedures

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In the past few decades our society in general and our schools in particular have experienced an upsurge in litigation that has reached heretofore unparalleled levels. Educational administrators and attorneys have slowly but surely come to realize the benefits of preventive law and are beginning to incorporate, with appropriate adjustments, strategies and techniques from the commercial sector.

Preventive Law

Preventive law was defined early as "[a] branch of law that endeavors to minimize the risk of litigation or to secure more certainty as to legal rights and duties."[1] Rightfully recognized as the father of preventive law, Louis M. Brown provided a solid base for this approach to law starting at the mid-point of the 20th century.[2] Learning and incorporating lessons from the medical profession, Brown advised law professors[3] and practitioners[4] to focus on legal health, including the early detection of legal risks.[5] Recognizing the need for and value of systematic diagnosis, Brown explored the concept of "legal autopsies"[6] and popularized the concept of "legal audits."[7]

In the successor publication to Brown's 17-year newsletter, the editors of *Preventive Law Reporter* explain: "The basic premise of preventive law is that the legal profession can better serve clients by focusing on appropriate consultation and planning rather than looking to litigation as the solution to all legal problems."[8] An implementing technique for individual clients is the periodic legal checkup, a systematic process of legal hygiene that includes data collection, analysis, recommendations, and follow-up.[9] The corresponding technique for institutional clients is the annual legal audit.[10]

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[1] Webster's Third International Dictionary 1798 (1961).

[2] L. Brown, Manual of Preventive Law (1950).

[3] Brown, *The Education of Potential Clients*, 24 So. Cal. L. Rev. 183 (1951).

[4] Brown, *Preventive Law and Public Relations: Improving the Legal Health of America*, 39 A.B.A. J. 556 (1953).

[5] Later in life, while recovering from open heart surgery, Brown further developed and disseminated insights into the importance and implementation of legal health maintenance. *See Preventive Medicine and Preventive Law: An Essay that Belongs to My Heart*, Law. Med. & Health Care 220 (Oct. 1983).

[6] Brown, *Legal Autopsy*, 39 J. Am. Judicature Soc'y 47 (1955).

[7] Brown, *Legal Audit*, 38 So. Cal. L. Rev. 431 (1965).

Commercial Applications

In a comprehensive overview of the theory and practice of preventive law, Brown and Dauer point out that the initial applications were typical in areas of transaction planning — e.g., contracts, incorporations, wills, and trusts.[11] Consequently, early instrumentation and implementation for institutional clients were largely limited to the business world.[12] More recently, the technique of a periodic legal audit has been variously elaborated for use by corporations.[13] Using an analogy from accounting, Brown and Dauer describe the legal audit in the corporate context as "essentially a professional review of the legal affairs of the business, done periodically and culminating in a summary report to management."[14] They provide a checklist of preliminary audit information, including ownership data, financial data, and other business data, as a possible starting point. Curzan

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8. *Editorial*, 1 Preventive L. Rep. 3 (July 1982). This periodical is published by Butterworth Legal Publishers, 15014 N.E. 40th St., Redmond, Wash. 98052.

9. L. Brown, Manual for Periodic Legal Checkup (1983); *see also* L. Brown & E. Dauer, Planning by Lawyers: Materials on a Nonadversarial Legal Process (1978); *cf.* Office of the Staff Judge Advocate, 12th Flying Training Wing, Preventive Law Handbook (undated booklet describing legal asistance program at Randolph, Texas, Air Force Base).

10. *See supra* note 7 and *infra* notes 13-17 and accompanying text.

11. Brown & Dauer, *A Synopsis of the Theory and Practice of Preventive Law*, in The Lawyer's Notebook (American Bar Association, rev. ed. 1982). This overview is also available in the first three issues of the Preventive Law Reporter (July 1982, Oct. 1982, and Jan. 1983).

12. *See, e.g.*, L. Brown, Legal Checkup Guides for Creditor-Debtor Relationships of a Going Business (1966); E. Dauer, "Preventive Law" for Lenders: an Illustrative Application (Robert Morris Associates Occasional Paper, 1975); *cf.* O'Neal, *Preventive Law: Tailoring Corporate Form of Business to Ensure Fair Treatment for All*, 49 Miss. L.J. 529 (1978).

13. *See, e.g.*, Curzan & Pelesh, *The Changing Role of Outside Counsel: A Proposal for a Legal Audit*, 56 Notre Dame Law 838 (1981); Gonser and Wilhelm, *A New Direction in Preventive Law*, 68 A.B.A. J. 446 (1982); Hardy, *Establishing Corporate Legal Audits and Drafting Compliance Programs*, 2 Preventive L. Rep. 118 (April 1984); Shafton, *Why Corporations Need an Annual Legal Review*, 66 Mgmt. Acct. 66 (Nov. 1981); Shafton, *Why Corporations Need an Annual Legal Review*, 1 Preventive L. Rep. 1 (Jan. 1983); Zeiger, *Legal Audits*, in The New Era of Corporate and Directors Liabilities (M. Pickholz & M. Small eds. 1981).

14. *See* Brown & Dauer, *supra* note 11, at A3-16.

and Pelesh suggest that this periodic function be conducted by an outside, independent counsel, who thereby reports legal problems to the corporate board through a special audit committee.[15] Characterizing the emphasis of the legal audit as "measuring compliance, or noncompliance, with a set of legal standards," Hardy elaborates a largely internal process that includes legal surveys and periodic educational seminars.[16] Pointing out that the checklist will vary according to the nature and needs of the client, Shafton emphasizes that the pervading purpose of the corporate legal audit is "to mold 'hot facts' rather than to aid a litigator supervising an 'autopsy.' "[17]

Educational Applications

The recognition, much less application, of preventive law has been belated and brief in the field of education thus far. In the preface to his text on the law of higher education, Kaplin made passing reference to the distinction between preventive and treatment law.[18] Similarly, the concluding chapter of a leading text dealing with the law of elementary/secondary education refers to a program in preventive law at the Education for the Commission of the States (ECS) that addresses emerging legal requirements.[19]

As the ECS program reveals, the instrumentation for and implementation of preventive law in education is still in its infant stage. Merle McClung, ECS's former director of law and education, proposed a four-step model for new education programs prior to their final formulation and implementation, including an evaluation of their legal merits on a 1-to-5 scale of vulnerability to successful suits.[20] Under ECS's current director of law and education, Patricia Lines, this approach has apparently continued in the form of discussions of emerging legal issues in public education at the state level.[21] Other efforts to put preventive law into practical form for state policymakers and local educators on the elementary/secondary level have been notably limited in scope[22] and sophistication.[23] The resistance of public school administrators, humorously illustrated by Carr,[24] is understandable but not insuperable.

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[15] *See* Curzan & Pelesh, *supra* note 13, at 847.

[16] *See* Hardy, *supra* note 13, at 122, 131.

[17] *See* Shafton, *supra* note 13, at 3; *cf.* Brown & Dauer, *supra* note 11, at A3-14: ("Litigating lawyers are historians. Preventive lawyers must be prophets.")

[18] W. Kaplin, The Law of Higher Education xii (1978).

[19] M. Yudof, D. Kirp, T. Van Geel, & B. Levin, Educational Policy and The Law 813 (1982); *cf.* Hawkins, *Back to the Legal Basics: An Ounce of Prevention*, 21 Kan. Sch. Bd. J. 8 (1982).

[20] McClung, *Preventive Law and Public Education: A Proposal*, 10 J. L. & Educ. 37 (1981). McClung appropriately pointed out that extra-legal local considerations must be taken into account and that the auditing approach is not a panacea. *Id.* at 41.

[21] *See, e.g., Preventive Law and New Education Initiatives*, 16 Compact 8 (Fall 1983).

The progress of preventive law in higher education is largely limited to a comprehensive inventory instrument for private colleges and universities[25] and an accompanying deskbook for the administrators of such institutions.[26] The eight-page inventory is an audit checklist of operational items in six areas: governance and trustees; academic administrators; admissions, financial aid and student programs; business affairs; development; and special problems of church-related colleges. Although helpful in terms of identifying various policies and procedures for possible legal attention, the items do not specifically take into consideration case law developments or the formal academic program. The deskbook, which explicitly advocates and incorporates a "preventive legal planning" approach,[27] specifies critical issues, planning steps, and bibliographic resources for each of eight operational areas.

These scattered sproutings in education, seen in light of the cross-fertilized and productive procedures in the commercial field, suggest that more fruitful growth may be in the offing. In his keynote address at NOLPE's 1983 convention, Bednar pointed out that although preventive law has not reached in public education the level of sophistication attained in business and commercial law, "[its] concepts would have great and immediate utility in many areas of the school practice if only we would pause, think, and use them."[28] Recognizing that techniques from the commercial context are readily applicable to the purely proprietary transactions of school systems, Bednar posed this challenge and observation for educational policymaking and practice:

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[22] *See, e.g.*, Lines, *Legal Do's and Dont's for State Policymakers Seeking to Provide Moral Instruction in the Public Schools*, Religious and Moral Values in Public Schools: A Constitutional Analysis 59 (1981).

[23] *See, e.g.*, Johnson, *Guidelines to Help Practitioners Stay Out of Court*, 68 NASSP Bull. 105 (1984).

[24] Carr, *How to Avoid Liability (by Avoiding Litigation)*, 63 Principal 51 (Sept. 1983). As a hypothetical and humorous response to a school attorney's advise to list all areas of potential liability in the school and to reduce or eliminate them, this school principal proposed, for example, removing the doors and furniture, discontinuing the lunch and recess programs, and dropping science, reading, and sex education from the curriculum.

[25] Center for Constitutional Studies, a Legal Inventory for Independent Colleges and Universities (1981).

[26] K. Weeks, Legal Deskbook for Administrators of Independent Colleges and Universities (1982).

[27] *Id.* at II-1.

[28] W. Bednar, *Preventive School Law*, in School Law Update: Preventive School Law 8-9 (T. Jones & D. Semler eds. 1984).

> Can we develop checklists and procedures for the legal health of our clients? Are "legal audits" practical and affordable? Can we make them that way? [T]here is room for original research on the forms preventive law analysis might take in particular school law problem areas .... Very little of our scholarly legal literature is being written from an overtly preventive point of view.[29]

Terry and Reaves' report at NOLPE's 1984 convention, describing their initial efforts in compiling a legal audit instrument for public school districts based on state statutes, regulations, and cases, is an auspiciously simultaneous development.[30] They emphasized the need for a corresponding effort to tackle the legal issues of a national dimension.

Legal Audit of Curriculum

As mentioned at the outset of this paper, public school administrators are beset by a bewildering and burgeoning array of legal requirements. Although the erupting volcano of legal activity contains succeeding substrata of constitutional, legislative, and regulatory magma, the lava that spurts forth in seemingly unpredictable and visibly threatening masses is litigation, particularly federal court decisions. The number of federal court decisions affecting the public schools for the period 1967-71 (n = 1273) was more than ten times the number for the period 1946-56 (n = 112).[31] More recent data indicate a general leveling off in the total number of such decisions, with an internal shift from overall governance issues to specific teacher and student issues.[32] As an example of the growth in the latter area, a recent compilation revealed that the number of civil cases involving public school students more than doubled in the period from 1977 (n = 217) to 1980 (n = 527).[33]

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29. *Id.* at 12-14.

30. J. Terry & A. Reaves, *Prevention through Policymaking and Legal Auditing* (topic presented at the annual meeting of NOLPE in Williamsburg, December 1984).

31. J. Hogan, The Schools, The Courts, and The Public Interest 7 (1974). State court cases declined during the same period. *Id.*

32. M. Jarvis, *Current Trends in Federal Court Intervention in Public Education* (paper presented at the annual meeting of the American Educational Research Association, April 1984). Jarvis reports an estimate of 1370 federal court decisions for the period 1972-82.

For judicial rather than empirical evidence of this possible plateau in federal case law, *see, e.g.*, Zirkel & Gluckman, *Suer Beware: Is the Pendulum Swinging*, 63 Principal 46 (1983), *reprinted in* 67 NASSP Bull. 126 (1983).

33. T. Marvell, A. Galfo, & J. Rockwell, Student Litigation: a Compilation and Analysis of Civil Cases Involving Students 1977-81 22 (1981). This compilation did not include tort liability cases, and the data for 1981 were not complete.

Curriculum Content

Reflecting the shift from the macro level of school systems to the inner sanctum of the classroom, the courts have helped to create a "new law of curriculum." In an article essentially coining this phrase in its title, van Geel observes:

> [A] whole new body of law has sprung up surrounding the school program. There are new doctrines and rules as to what may and may not be taught, how it must or must not be taught, and who has the authority to decide curricular matters. The schools' program has become legalized and the control of it more centralized.[34]

Yet, the literature available to the administrator is of little practical assistance. The bulk of federal cases decided during the past decade are not tabulated, much less translated into practical and preventive form, in the few legal sources specific to the public school curriculum.[35] The result, as pointed out by Sorensen and Willis, is that "[o]ften choices are made because of ignorance or uncertainty about both the legal constraints and legal freedoms under which local decision-making about public school curriculum operates."[36]

As the aforementioned[37] challenge by Bednar suggests, it is in the area intrinsic to the public educational enterprise that such an approach is necessary and appropriate. The heart of the public school enterprise is teaching learning interaction, or the instructional process. Although variously defined, "curriculum" here is used broadly to refer to this process in terms of the triangular triad of what is targeted, taught, or tested.[38]

Further, the curricular area is particularly amenable to a preventive law approach because the concept of a fiscal audit has already been translated into procedures and instrumentation for an instructional audit.[39] The next section describes an instrument that the author has developed in preliminary form as a first step in meeting Bednar's challenge.

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[34] van Geel, *The New Law of the Curriculum,* 86 Sch. Rev. 594 (1978).

[35] *See, e.g.,* McGhehey, *Control of the Curriculum,* in The Courts and Education 140 (C. Hooker ed. 1978).

[36] G. Sorenson & G. Willis, Constitutional Considerations in Choosing Curriculum Content for Public Schools (unpublished paper).

[37] *See supra* note 29 and accompanying text.

[38] *See, e.g.,* English & Steffy, *Differentiating Between Design and Delivery Problems in Achieving Quality Control in School Curriculum Development,* 23 Educ. Tech. 29 (Feb. 1983). English uses "written" for the first side of the triangle, referring to lesson plans, textbooks, curriculum guides, and whatever else is used to "target" the areas of instruction. The latter term is used herein for the sake of breadth and symmetry.

[39] *See, e.g.,* Burns, English & Robertson, *Performance Audit: A Catalyst for Educational Reform,* 12 Thrust 36 (Nov.-Dec. 1982); Kingston, Barber & Rogers, *The*

Instrument Format

The "Legal Audit Instrument for Public School Curriculum" has been derived from court decisions that are based on the federal Constitution, legislation, and regulations.[40] Corresponding cases and provisions within each state will require strict but supplementary attention when the instrument is applied.[41] Using the aforementioned central sources of law and definition of public school curriculum, the author has identified over 160 court decisions. The decisions yield items in seven areas: bilingual education; religious instruction; sex, health, and related education; special education; achievement and psychological testing; teaching methods or coverage; library and instructional materials.

Within each of these areas, the items comprise a checklist of yes-no questions targeted to local policy and practice. The answer to each question triggers major or minor attention, somewhat like the aforementioned[42] inventory in higher education. Specifically, a "yes" or "no" response that is circled signals that major attention is appropriate. Next, the full version of the instrument indicates the primary source(s) of federal law on which the related case law is based. Finally, the instrument indicates, given a circled response to that question, the probable vulnerability to a successful suit and the approximate assessment of compliance costs, each based on a 1-to-5 scale reminiscent of McClung's proposal.[43] On accompanying pages in each section, the instrument lists the corresponding case citations for

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Program Audit, 41 Educ. Leadership 50 (May 1984); Stephens, *Improving Instruction: Getting from Point "A" to Point "B"*, 41 Sch. Ad. 16 (June 1984). The "effective schools" movement is currently furthering the instrumentation and utilization of this kind of approach. *See, e.g.*, Appalachia Educational Laboratory, Promoting School Excellence through the Application of Effective Schools Research (B. Sattes ed. 1984); National Ass'n of Elementary School Principals, Standards for Quality Elementary Schools (1984).

[40] Depending on feedback in a future stage in development, the author envisions adding items based on relevant directives in federal statutes and regulations that have not evoked judicial review.

[41] For an overview of the variety of related statutes and regulations at the state level, *see* National Institute of Education, State Legal Standards for the Provision of Public Education (1978); *see also* Edelman, *Basic American*, 6 NOLPE Sch. L.J. 83 (1976); C. Pipho & C. Hadley, State Activity: Minimal Competency Testing (Education Commission of the States, April 1984); Kenney & Alexander, *Sex/Family Life Education in the Schools: An Analysis of State Policies*, 9 Fam. Plan Population Rep. 44 (June 1980).

[42] *See supra* note 25 and accompanying text.

[43] *See supra* note 20 and accompanying text.

each item, which are largely post-1970.[44] In order to facilitate the analysis across and within these court decisions, each citation is coded with these symbols in relation to the "trigger" answer for that item:

"+" = favorable support from the point of view of a prospective plaintiff (typically because one or more parents, pupils, or teachers sued and prevailed with respect to this issue in the cited case)
"-" = unfavorable support from the point of view of the prospective plaintiff (typically because the school district defended and prevailed with respect to this issue)
"+/-" = inconclusive or mixed outcome, such as a remand on procedural grounds or partial support for both parties.

Thus, using the "Religious Instruction" section as an example (see the Appendix), the person using the instrument is instructed to first check, with the advice of local counsel, the state legislation and regulations pertaining to religious instruction in the public schools and the court cases pursuant to such legislation and regulations. Assuming the source person is an administrative representative of the school district, whether he uses the instrument directly or via an interview with an internal or outside auditor, the first item asks if "you" (i.e., the school district) provide for or allow organized vocal prayer during the school day. A response of "yes" is circled to trigger attention to high probability of a successful suit, if this policy or practice would be challenged, based on the first amendment of the Constitution. Finally, the fiscal cost for switching to the opposite, defensible posture is estimated to be low. The relevant case citations for this item are shown on the attached page as an unbroken line of 13 court decisions supporting the plaintiff's side, thus leading to the high probability in favor of a successful suit against the school district. The other items relate to other religious-related practices or policies within the school day; thus, practices or policies dealing with prayer groups before or after school or with prayers at baccalaureate or graduation services are not included. Finally, cross references to related items in other sections are noted at the end of this section.

Intended Uses

The development of this draft instrument is only a first step. The author envisions the following additional developmental steps:

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[44] Jurisdictional limitations are evident in the citations. Such limitations are left ultimately to the interpretation by the auditing team, which also must take extra-legal policymaking considerations (e.g., risk management and resource allocation) into account.

1. Ascertaining and improving the validity, reliability, and feasibility of the instrument and its administration procedures, based on systematic scrutiny and suggestions by a national panel of school law experts and local school administrators.
2. Pilot testing the revised instrument[45] as administered by a specially trained external legal auditor in cooperation with a local audit committee, which could be comprised, for example, of a board member, the superintendent, a principal, and a teacher organization representative.[46]
3. Dissemination of the revised instrument along with a companion instructional manual and, possibly, source deskbook.[47]

Such steps will obviously require internal fortitude and external funding. Nevertheless, the task is not beyond reach; the work to this point has been accomplished by the author without outside support.

In the meantime, the draft instrument serves not only as an illustration of the legal audit concept as potentially applied to education, but also as a vehicle for the continuing education of school administrators. The author has found the document to be an effective outline for tabulating and translating the burgeoning case law in the curricular area to participants in preventive school law programs sponsored by the National Academy of School Executives (NASE).[48] The first such program was initiated by the author in April 1984; the response was so favorable that it was repeated as a pre-conference institute at AASA's national meeting in March 1985. The author welcomes the suggestions and support of NOLPE in this effort to extend the fruitful work of Brown, Dauer, and others to our nation's public educational institutions.

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[45] It is anticipated that only the part of the instrument consisting of the yes-no questions (without circles) will be used for local data collection, with the other parts (viz., source, probability and cost columns and the accompanying citations) subsequently provided in cooperation with the school district's attorney.

A mechanism for regularly updating the instrument, including the case citations, will need to be developed.

[46] Depending on local circumstances, the source persons may vary. For example, in large districts the focus of attention may be groups of or even individual schools rather than the entire district. Similarly, procedures may vary to accommodate local limits and concerns such as considerations of confidentiality and concurrence.

[47] In interested states, additional items representing that state's statutory and case law may also be developed. *See supra* notes 30 and 41 and accompanying text.

[48] NASE is the inservice arm of the American Association of School Administrators (AASA).

APPENDIX

Religious Instruction*

First check to see if state legislation and/or regulations mandate, permit, or prohibit religious instruction in the schools. Do not assume that these state rules are constitutional; review them carefully with the advice of counsel in light of the following items and cases:

	TRIGGER		SOURCE			PROBABILITY					COSTS				
	Yes	*No*	*Const.***	*Leg.*	*Reg.*	*Lo* 1	2	3	4	*Hi* 5	*Lo* 1	2	3	4	*Hi* 5
1. Do you provide for or allow organized, vocal prayer, even if only voluntary, as part of the school day?	○		x							x	x				
2. Do you provide for or allow organized silent meditation, even if only voluntary, as part of the school day?	○		x						x		x				
3. Do you provide for devotional Bible recitation, with or without excusal, as part of the school day?	○		x							x	x				
4. Do you provide for Bible study as part of the school program?	○		x					x				x			
5. Do you provide classes in Transcendental Meditation or in release-time religious education to satisfy elective course requirements?	○		x						x		x				
6. Do you restrict study of evolution or require study of creationism?	○		x							x	x				
7. Do you have Christmas songs or realia as part of the school program?	○		x				x				x				
8. Do you provide academic penalities for student absences on religious holidays, at least when they exceed a limit of two or three such absences?	○		x						x		x				

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*See also "Sex, Physical and Related Education" section - items 1 thru 4, and "Text and Library Books" section - items 1 thru 3.

**The primary federal constitutional sources here are the establishment and free exercise clauses of Amendment I.

Religious Instruction

1. (+) Engel v. Vitale, 370 U.S. 421 (1962)
  (+) School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963); *see also* Chamberlin v. Dade County Bd. of Pub. Instruction, 377 U.S. 402 (1964)
  (+) Attorney Gen. v. School Comm. of No. Brookfield, 199 N.E.2d 553 (Mass. 1964); *see also* Johns v. Allen, 231 F. Supp. 852 (D. Del. 1964)
  (+) Opinion of the Justices, 228 A.2d 161 (N.H. 1967)
  (+) DeSpain v. DeKalb County Community School Dist. 428, 384 F.2d 836 (7th Cir. 1967), *cert. denied*, 390 U.S. 906 (1968)
  (+) Mangold v. Albert Gallatin Area School Dist., 438 F.2d 1194 (3d Cir. 1971); *see also* Goodwin v. Cross Country School Dist. No. 7, 314 F. Supp. 417 (D. Ark. 1973); Opinion of the Justices, 307 A2d 558 (N.H. 1973)
  (+) Opinion of the Justices, 307 A.2d 558 (N.H. 1973)
  (+) Meltzer v. Board of Pub. Instr., 577 F.2d 311 (5th Cir. 1978), *cert. denied*, 439 U.S. 1089 (1979)
  (+) Kent v. Commissioner of Educ., 402 N.E.2d 1340 (Mass. 1980)
  (+) Collins v. Chandler Unified School Dist., 644 F.2d 759 (9th Cir. 1981), *cert. denied*, 454 U.S. 863 (1981)
  (+) Opinions of the Justices to the House of Representatives, 440 N.E.2d 1159 (Mass. 1982)
  (+) Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982)
  (+) Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983) *rehearing denied*, 713 F.2d 614, *aff'd*, 52 U.S.L.W. 3713 (Apr. 3, 1984)
  (+) *cf.* Bender v. Williamsport Area School Dist., 741 F.2d 538 (3d Cir. 1984)
2. (-) Reed v. Van Hoven, 237 F. Supp. 48 (W.D. Mich. 1965)
  (-) Opinion of the Justices (1967) *supra*
  (-) Opinion of the Justices (1973) *supra*
  (-) Gaines v. Anderson, 421 F. Supp. 337 (D. Mass. 1976)
  (+) Beck v. McElrath, 548 F. Supp. 1161 (M.D. Tenn. 1982), *vacated for mootness sub nom.* Beck v. Alexander, 718 F.2d 1098 (6th Cir. 1983)
  (+) Opinions of the Justices to the House of Representatives, *supra*
  (+) Duffy v. Las Cruces Pub. Schools, 557 F. Supp. 1013 (D.N.M. 1983)
  (+) May v. Cooperman, 572 F. Supp. 1561 (D.N.J. 1983)
  (+) Jaffree v. Wallace, *supra, cert. granted*
3. (+) School Dist. of Abington Township v. Schempp, *supra*
  (+) Attorney Gen. v. School Comm. of No. Brookfield; Johns v. Allen, *supra*
  (+) Mangold v. Albert Gallatin Area School Dist.; Goodwin v. Cross Country School Dist. No. 7, *supra*
  (+) Meltzer v. Board of Pub. Instruction *supra*
  (+) *cf.* Stone v. Graham, 449 U.S. 39 (1980)
  (+) Hall v. Board of School Comm'rs, 656 F.2d 999 (5th Cir. 1981), *appeal after remand*, 707 F.2d 464 (11th Cir. 1983)
4. (+/-) *cf.* Vaughan v. Reed, 313 F. Supp. 431 (W.D. Va. 1970)
  (-) *cf.* Meltzer v. Board of Pub. Instruction, *supra*
  (+/-) Wiley v. Franklin, 497 F. Supp. 350 (E.D. Tenn. 1980) ("Wiley III")
  (+) Hall v. Board of School Comm'rs, *supra*
  (+) Crockett v. Sorenson, 568 F. Supp. 1422 (W.D. Va. 1983)
5. (-) Smith v. Smith, 523 F.2d 121 (4th Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976)
  (+) Malnak v. Yogi, 592 F.2d 197 (3d Cir. 1979)
  (+/-) Lanner v. Wimmer, 662 F.2d 1349 (10th Cir. 1981)
6. (+) Epperson v. Arkansas, 393 U.S. 97 (1968)
  (+) Smith v. State, 242 So. 2d 692 (Miss. 1970)
  (+) Moore v. Gaston County Bd. of Educ., 357 F. Supp. 1037 (W.D.N.C. 1973)
  (+) Wright v. Houston Indep. School Dist., 486 F.2d 137 (5th Cir. 1973)
  (+) Daniels v. Waters, 515 F.2d 485 (6th Cir. 1975), *on remand*, 399 F. Supp. 510 (M.D. Tenn. 1975)
  (+) Dale v. Board of Educ., 316 N.W.2d 108 (S.D. 1982)
  (+) McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255 (E.D. Ark. 1982)
  (-) Aguillard v. Treen, 440 So. 2d 704 (La. 1983)
7. (-) *cf.* Lawrence v. Buchmueller, 243 N.Y.S.2d 87 (Sup. Ct. 1963)
  (-) Florey v. Sioux Falls School Dist., 619 F.2d 1311 (8th Cir. 1980), *cert. denied*, 449 U.S. 987 (1980)
  (-) R.J.J. v. Shineman, 658 P.2d 910 (Mo. App. 1983)
  (-) *cf.* Lynch v. Donnelly, 52 U.S.L.W. 4317 (Mar. 6, 1984)
8. (+) Church of God v. Amarillo Indep. School Dist., 511 F. Supp. 613 (N.D. Tex. 1981)

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Academic Penalties for Student Misconduct

Clifford P. Hooker

Educators and the general public agree that there can be no excellence in education without discipline in the schools. Yet many teachers and administrators are running low on disciplinary tactics that are both legally acceptable and educationally sound. Corporal punishment may pass judicial muster, but it is a drastic measure disreputed by most parents and educators who question its educational validity. Suspensions for more than one day must meet time-consuming due process standards, and the possibility of costly litigation increases if the school attempts lengthy suspensions or permanent expulsions. After-school detention is also unworkable, because most students are transported to and from school, and the cost of additional transportation for detainees can be prohibitive.

A review of court opinions on school discipline suggests that the use of academic penalties as a sanction for student misconduct is widespread and increasing. Most grading systems subtly reward students for good behavior and effort. Particularly among poorer students, it is a common practice to give higher grades to those who attend classes and make an effort than to the habitual truant. This practice has never resulted in a lawsuit against a teacher or school. However, when earned grades are reduced or credits are withheld, as a form of punishment, legal challenges sometimes ensue.

The battle between recalcitrant students and school officials who use academic penalties to enforce school rules is not new. The events leading to one of the oldest cases of record began on the evening of May 30, 1918, at the high school graduation in Casey, Iowa. Three members of the graduating class, including the valedictorian, refused to wear the furnished caps and gowns, which smelled offensive because of their recent fumigation using formaldehyde. Standing at the entrance to the dressing room where the class members were preparing for commencement exercises, the superintendent issued the edict: "Thou shall not pass without wearing the gowns." A total of three young women, all of whom had completed the prescribed course of study with satisfactory grades, thus were not in their seats on the platform for graduation. The school board refused to grant diplomas to the students who had not participated in commencement ceremonies.

The Supreme Court of Iowa ordered the school board to grant the diplomas.[1] Holding that the school board rule relative to the wearing of caps and gowns was unreasonable, the court said: "The wearing of a cap and gown on commencement night has no relation to educational values. . . . The enforcement of such a rule is purely arbitrary and especially so when the offending pupil has been passed for graduation after the performance on her part of all prescribed educational requirements."[2]

Many school boards are today faced with a contemporary version of essentially the same issue that the Iowa board faced over sixty years ago. May school boards adopt policies prescribing grade reductions for violations of school rules? At least a dozen courts have struggled with this question in the past decade.

Cases in Which the School Board Prevailed

The school board has prevailed in seven of the twelve reported cases of the past ten years. In four cases, the board has successfully defended its policies that assess academic penalties for truancy.

Grade Reduction for Truancy

Knight v. Board of Education[3] is the leading truancy case. Knight, while a senior at an Illinois high school, skipped school for two days during the spring semester. As a result of the unexcused absences, and in consideration of the school board's policy that grades would be reduced by one letter grade per class per unexcused absence, Knight's grades were lowered. Appealing the trial court's judgment for the school board, Knight alleged that the consequences imposed by the school board deprived him of substantive due process of law and of the equal protection of the law, in violation of both the state and federal constitutions. Distinguishing this case from *Goss v. Lopez*,[4] the Appellate Court of Illinois observed that Knight was not denied the right to an education, but only the receipt of grades. The court acknowledged some similarity between the effects of unwarranted derogatory information about a student, the condition condemned in *Goss*, and the receipt of lowered grades. However, the court explained, "We are most reluctant to intervene in the grading process. Where a grade is dispensed by a teacher within that teacher's subjective discretion, we can see no justification for court intervention."[5]

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[1] Valentine v. Independent School District, 183 N.W. 434 (Iowa 1921).
[2] *Id.* at 436.
[3] 348 N.E.2d 299 (Ill. App. Ct. 1976).
[4] 95 S. Ct. 729 (1975).

The only case in this group that has reached a federal appellate court is the Fifth Circuit's decision in *Raymon v. Alvord Independent School District*[6] in 1981. Roberta Raymon, a high school student in Texas, was penalized for an unexcused absence from class by the deduction of three points from her six-week algebra grade. This altered her grade point average from 95.478 to 95.413, but it did not change her class standing, and she remained second in her class. Arguing that the penalty was arbitrarily imposed in violation of the fifth and fourteenth amendments, her parents sued for damages and injunctive relief under 42 U.S.C. § 1983. The federal district court, without deciding the federal constitutional claim, exercised jurisdiction over the pendent state claims and ordered the three points restored to Roberta's algebra grade. Attorney's fees were denied, and Roberta appealed that part of the decision.

With a few blunt words, the Fifth Circuit Court of Appeals reversed and ordered the district court to dismiss the complaint, stating: "A complaint that alleges the existence of a frivolous or insubstantial federal question is not sufficient to establish jurisdiction in a federal court. Ms. Raymon's claim . . . is patently insubstantial."[7]

A teacher's rule that participation in a Christmas program was a requirement for the completion of a course was tested in a Missouri court in 1983.[8] The teacher announced on the first day of the term that no one in band or chorus would be excused from participation unless a request was made to the teacher before the program. Johnson, a senior, attended band and chorus regularly until the day before the performance when he left with his family to visit relatives in Hawaii, on a trip that was planned the previous summer. Because of his unexcused absence, Johnson received an "F" grade for the second half-semester in band and chorus.

The trial court and the Missouri Court of Appeals upheld the teacher's policy. Both courts found that there was sufficient evidence to support a conclusion that the student was fully aware of the consequences of his unexcused absence and that he willfully neglected to inform the teacher of his planned absence.

The New Milford, Connecticut attendance policy provides two types of academic sanctions for students who are absent from school. Course credit is withheld from any student who, without receiving an administrative waiver, is absent from any year-long course for any reason for more than twenty-four class periods. In addition, the course grade of any student whose absence from school is unapproved is subject to a five-point reduction for each unapproved absence after the first.

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[5] 348 N.E.2d 299 (Ill. App. Ct. 1976) *quoting* Goss v. Lopez, 95 S. Ct. at 735.

[6] 639 F.2d 257 (5th Cir. 1981).

[7] *Id.* at 258.

[8] Johnson v. Shineman, 658 S.W.2d (Mo. Ct. App. 1983).

The stated purpose of the attendance policy is educational rather than disciplinary. A student's disciplinary suspension from school, for reasons unrelated to attendance, is considered an approved, rather than an unapproved, absence. A student's absence from school, whether approved or unapproved, is not a ground for suspension or expulsion.

As a result of unapproved absences, Campbell's grades in three classes were lowered from passing to failing. In a fourth course his grade was passing, but he received no credit because of his total of thirty-eight absences.

The trial court and the Supreme Court of Connecticut upheld the school board policy. Both courts rejected Campbell's claim that the policy is violative of state law and the state and federal constitutions. Holding that the school board policy is academic rather than disciplinary, the court cited *Board of Curators of the University of Missouri v. Horowitz*[9] to explain that academic sanctions require far less stringent procedural requirements than disciplinary suspensions or dismissals. Academic evaluations of a student necessarily depend on professional judgments that are more subjective than the typical factual questions presented in disciplinary decisions. Bowing to the expertise of the educators who wrote the policy in question, the court said: "The policy decision that academic credentials should reflect more than the product of quizzes, examinations, papers and classroom participation . . . constitutes an academic judgment about academic requirements. We agree with the defendant's characterization of their policy."[10]

Grade Reduction During Suspensions

Some schools impose grade reductions when students are absent from classes because they have been temporarily suspended from the school. This policy has survived legal challenge three times in the past decade. In *Fisher v. Buckburnett*,[11] a student sought relief from suspension and resultant loss of a trimester's credit for violation of a school drug rule. The student claimed that she was denied due process when the board acted under its policy of mandatory suspension. She alleged that even though a hearing was provided, by following its policy of mandatory suspension, the hearing was merely a formalistic ritual. The court disagreed. The court observed that the student was fully heard by the board on why she believed the policy should not apply. The court found nothing in the due process clause to prohibit the board from presuming that the lengthy suspension was the correct punishment for breaches of school discipline.

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[9] 98 S. Ct. 948 (1978).

[10] Campbell v. Board of Educ. of New Milford, 475 A.2d 289, 294 (Conn. 1984).

[11] 419 F. Supp. 1200 (N.D. Tex. 1976).

An Illinois appellate court approved a grade reduction policy in *Donaldson v. Board of Education for Danville School District.*[12] The student was suspended for three days for fighting on school grounds. Since his absence from classes was regarded as unexcused, he was not allowed to make up the six-week finals and course work that he missed, which resulted in his receiving lower midterm grades. The court held that the school board had not abused its discretion, even though the suspension occurred during an examination period, because the punishment of a three-day suspension was neither harsh nor excessive. There was some indication in the opinion that if the student had missed "final examinations," there would have been such a substantial effect on his ultimate course grade as to make the decision to suspend him during that time arbitrary.

A Texas court recently upheld a school board policy that attaches an academic penalty to school suspensions. In *New Braunfels Independent School District v. Armke,*[13] two high school seniors were suspended for three days for consuming an alcoholic drink on a school-sponsored trip. In addition to the suspension, the school imposed an academic penalty that resulted in each student receiving grades of zero on all graded classwork for each day of the suspension. The students argued that the board had not adopted a policy to permit this form of "double punishment." The court found that a statement in the student handbook, which expressly provided for the suspensions and grade reductions, was sufficient to place the students on notice of the punishment.

Cases in Which the Student Prevailed

In the past decade, student plaintiffs have prevailed in five challenges of school board policies that assign academic penalties for non-academic conduct. They succeeded in three truancy and two suspension cases.

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[12] 424 N.E.2d 737 (Ill. App. Ct. 1981).

[13] 658 S.W.2d 330 (Tex. Civ. App. 1983).

Grade Reduction for Truancy

The first student victory occurred in the Supreme Court of Kentucky in 1975.[14] The school board had included in the students' handbook a regulation concerning unexcused absences that classified absences resulting from suspensions as unexcused absences. Tommy Bale had been suspended from school on two separate occasions for possession and consumption of alcoholic beverages on school grounds. The unexcused absence rule was invoked for the second offense, when Tommy was suspended for four days. The result was that his semester grades were reduced in three of his five courses.

Tommy challenged the school board's authority to invoke the unexcused absence regulation. Refusing to follow the board's argument that the statutes gave it this authority, the court found that these statutes were directed to regulations for the conduct of students. The statutes, however, clearly preempted:

> the right of school officials to promulgate disciplinary regulations that impose additional punishment for the conduct that results in suspensions. If the conduct of the student in the judgment of the board warrants invoking the statutory authority to suspend, and school authorities do suspend, they have the right to determine the duration of suspension so that such action constitutes a complete punishment for the offense.[15]

A slightly different issue was examined in *Hamer v. Board of Education.*[16] A high school student left school without proper permission and received a three-percent reduction in the total grade of each class missed. The student challenged the punishment on the grounds that there was no express school board policy authorizing the punishment. He argued that the school board improperly delegated its rule-making authority to the principal of the school.

The Appellate Court of Illinois agreed with the substance of the holding in *Knight*,[17] but concluded that the student was entitled to be heard on the question of whether the grade reduction for unauthorized absence was approved policy of the board.

In another truancy case, Wendy Blackman was absent from the Onteona, New York High School at least twenty-five days and she skipped her social studies class an additional twenty-three days. School officials suspended Wendy from her social studies class and refused to allow her to take the final examination in that class. Wendy's parents sued for a recision of the officials' actions.

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[14] Dorsey v. Bale, 521 S.W.2d 76 (Ky. 1975).

[15] *Id.* at 525.

[16] 382 N.E.2d 231 (Ill. App. Ct. 1978).

[17] Knight v. Board of Educ., 348 N.E.2d 299 (Ill. App. Ct. 1976).

After stating that "Wendy is and was a truant," the court ruled in her favor.[18] Referring to the compulsory attendance statute in New York, the court found that the school officials could have arrested Wendy and placed her in attendance. Instead, the officials' actions were based on a rule that was unauthorized by New York law.

Grade Reduction During Suspensions

In a Colorado case, Artie Gutierrez was denied academic credit for the fall semester of the 1977-78 school year because of his failure to fulfill attendance requirements. He challenged the school officials' action in state court. The district's attendance policy provided that a student would be denied academic credit for all classes in which more than seven absences occur in a semester. The seven allowable days of absence were to accommodate personal illness, professional appointments, serious personal or family problems, or any other reason.

The trial court and the Colorado Court of Appeals held that the district's attendance policy was invalid because it was inconsistent with the state compulsory attendance law.[19] The appellate court explained that Colorado law requires students to attend school for at least 172 days during the school year. Days on which a student is "temporarily ill or injured" or "has been suspended or expelled" are, however, counted as part of the 172 mandatory attendance days. The court held: "The denial of academic credit to the [student] based on this policy was in excess of the school district's authority."[20]

In the last and most recent of the reported cases, Debbie, an eleventh grade student at Cumberland Valley, Pennsylvania High School, was suspended for five days because she drank a glass of wine while on a class field trip to New York City. In accordance with the district's disciplinary policy, her grades in each subject were reduced by ten points — two percentage points for each day of suspension.

The Commonwealth Court of Pennsylvania agreed with the trial court that this grade reduction was improper.[21] After noting that the case is one of first impression in Pennsylvania, the court said it "must decide the legality of a Board policy, not specifically authorized or proscribed by statute or regulation, which authorized penalties, affecting and reducing educational standing, for infractions that are not education related." While noting that the board has authority to adopt reasonable rules and regulations regarding the conduct and deportment of students, the court determined that this does not include authority to assess penalties that downgrade achievement for reasons that are irrelevant to the achievement being graded. It is improper and illegal to misrepresent achievement in this manner. The court did note in a parenthetical comment that it would accept the board's policy of grade reduction if it were limited to academic cheating, explaining that "cheating is related to grading."

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[18] Blackman v. Brown, 419 N.Y.S.2d 796 (N.Y. App. Div. 1978).

[19] Gutierrez v. School Dist. R-1, 585 P.2d 935 (Colo. Ct. App. 1978).

[20] *Id.* at 937.

[21] Katzman v. Cumberland Valley School District, 479 A.2d 671 (Pa. Commw. 1984).

Conclusions

So where are we? Case law on the question of academic penalties for student misconduct is anything but settled. In the past decade, the misbehaving students won five and lost seven of the legal encounters examined in this paper. In challenges of school board policies that assess academic penalties for truancy, students won in three and lost in four cases. In challenges of policies that include grade reduction with suspensions, students won in two and lost in three cases.

None of these court opinions is controlling. Only two state supreme courts have ruled on the question (Kentucky in 1975 in *Dorsey* and Connecticut in 1984 in *Campbell*). Two federal district courts have examined the question in *Fisher* and *Raymon* and have reached different conclusions. The only United States court of appeals *(Raymon)* to rule on the use of academic penalties for student misconduct reversed the trial court and ordered it to dismiss the complaint for lack of a federal question.

Given this hodgepodge of court opinions, conclusions are neither numerous nor of great value. Nevertheless a few observations are warranted.

1. Although not directly addressed in this discussion, it is clear from dicta in numerous opinions that courts are loathe to intrude in matters that are purely academic. Academic decisions are fairly sacrosanct and will be scrutinized only when they are challenged as arbitrary, malicious, in bad faith, or as implicating other constitutional rights.

2. When academic sanctions are used as a disciplinary response they are subject to legal challenge as ultra vires (beyond or without proper authority), or as violative of substantive or procedural due process.

3. Most courts require a rational connection (nexus) between the academic sanction and the conduct of the student. Some courts are quite lenient in finding this critical link. This point is best illustrated

in cases involving school attendance and academic grades. In four of the seven cases in this group *(Knight, Raymon, Johnson,* and *Campbell),* the board of education prevailed. These courts assumed a rational relationship between class attendance and student achievement. In the three cases where the students prevailed on this issue, the courts failed to discover this connection, holding instead that the lowering of grades of truants is outside the rule-making authority of the board. *(Hamer, Blackman,* and *Gutierrez)*

4. School rules that impose academic sanctions for student misconduct are most likely to be upheld if they incorporate the guidelines outlined below.

A. Explicit policies should be adopted by the board and made known to the students. The students in *Hamer* and *New Braunfels* maintained that there was no school board policy that applied to their situation. The *Hamer* court announced that, although it was inclined to follow *Knight* in upholding the school board, it was remanding the case for a hearing on the question of relevant school board policies. The *New Braunfels* court found that a statement in the student handbook, which expressly provided for suspension and grade reduction, was sufficient to place the students on notice.

B. There should be a provision in the policy that permits students to take final examinations. This provision reduces the harshness of the penalty, especially for seniors in high school whose continued education and employment opportunities may be adversely affected if they are not given an opportunity to take final exams.

C. Academic penalties for student misconduct should be limited to those serious offenses that also result in suspension from school. The absence from school because of the suspension creates the essential nexus between the grade reduction and the misconduct. Although not all courts will uphold a school policy that results in a "double punishment," several have been willing to do so. Several attorney general opinions also advise against grade reduction for student misconduct unless the conduct is serious enough to warrant a simultaneous suspension from school.[22] To illustrate, a demerit system that reduces a student's grades for drinking may be unreasonable and violative of substantive due process unless a period of suspension is attached to the penalty.

D. School policies should meet minimum standards of due process. The offending students should be notified of the charges against them, informed of the nature of the evidence, and given an opportunity to respond — all before any determination of their punishment. The *Shineman* and *Armke* opinions make it clear that due process is required.

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[22] *See* 74 Op. Cal. Att'y Gen. 145 (1975); Op. Ky. Att'y Gen. 59 (1973); and Op. Mo. Att'y Gen. 178 (1973).

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Faculty Dismissal: Comparison of Public and Private Higher Education

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Steven Permuth

Introduction

Public and private institutions of higher education, operating as they do with different bases of support and functioning to promote different clientele interests, nonetheless present striking similarities in problems pertaining to faculty dismissal.

The purpose of the first part of this article will be to highlight similarities between the two kinds of institutions and accent the critical differences between them in the ways they must handle faculty dismissals in disciplinary situations.[1] The second part of the article will focus on faculty dismissals for other than disciplinary reasons, particularly reasons related to financial exigency. Public higher education institutions are subject to both constitutional and contractual constraints where private schools are subject almost solely to self-imposed contractual limitations.

The United States Supreme Court has declared a number of standards relevant to the subject of constitutional rights and faculty dismissal. In *Pickering v. Board of Education*[2] the Court required that a balance be struck between "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the state, as an employer, in promoting the efficiency of the public services it performs through its employees."[3] In *Perry v. Sindermann*[4] the Court ruled that a teacher who had held his faculty position for four years in reliance upon a de facto tenure provision had a legitimate claim of entitlement requiring notice and opportunity to be heard.

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[1] The term "disciplinary" is being used in an expansive sense to include such disparate forms of faculty treatment as "contract nonrenewal," Daulton v. Affeldt, 678 F.2d 487 (4th Cir. 1982); "denial of tenure," Stern v. Shouldice, 706 F. 2d 742 (6th Cir. 1983; "demotion," Smith v. Gwydir, 446 N.Y.S.2d 385(N.Y. App. Div.1982); as well as "dismissal for cause," Stastny v. Board of Trustees of Central Washington University, 647 P.2d 496 (Wash. Ct. App. 1982).

[2] 391 U.S. 563 (1968)

[3] *Id.* at 568.

[4] 408 U.S. 593 (1972)

In *Board of Regents v. Roth*[5] the Court determined no constitutional rights to "liberty" were involved where contract nonrenewal of a nontenured faculty member without any reason given did not impose any stigma or other disability that foreclosed the teacher's freedom to take advantage of other employment opportunities, or otherwise injure the employee's good name, reputation, honor or integrity in the community.[6] In *Mt. Healthy City Board of Education v. Doyle*[7] the Court held that where a teacher alleged discipline or termination for protected free speech she bears the burden of establishing that the protected conduct was a motivating or substantial factor in the termination or discipline.[8] Most recently in a non-education case the Court significantly restricted the first amendment protected right of speech of public employees only to matters of public concern:

> When a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.[9]

In evaluating faculty termination or discipline in light of faculty expression of public interest the Court has declared a number of factors which must be considered: the need for harmony in the office or work place; whether the school's responsibilities require a close working relationship with the plaintiff-faculty member's co-workers when the speech in question has caused or could cause the relationship to deteriorate; the time, manner and place of the speech; the context in which the dispute leading to termination or discipline arose; the degree of public interest in the speech; and whether the speech impeded the employee's ability to perform his or her duties.[10]

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[5] 408 U.S. 564 (1972)

[6] *Id* at 573. The *Roth* Court expressed the conditions which would impose a stigma as "a charge . . . that [the employee] had been guilty of dishonesty, or immorality."

[7] 429 U.S. 274 (1974).

[8] *Id.* at 287. Even if the teacher met her burden of proof the school can still prevail if it can show by a preponderance of the evidence "that it would have reached the same decision . . . even in the absence of the protected conduct."

[9] Connick v. Myers, 103 S. Ct. 1684, 1690 (1983).

[10] *Id.* at 1691-92.

Termination of Nontenured Faculty

Where the faculty member to be dismissed is nontenured the issues addressed by the courts are: whether the public educational institution must give a reason for faculty member termination; whether the faculty member has presented sufficient evidence under the *Mt. Healthy* doctrine to prevent summary judgment; and whether the institution or its employees are immune from lawsuits.

In *Pauk v. Board of Trustees of City University of New York*[11] a court determined that "no reasons need be given a nontenured teacher who has been denied reappointment."[17] In *Pauk* the court did not have to consider plaintiff's alleged civil rights cause of action since that cause had been earlier dismissed as time-barred.[13] However, the *Pauk* court did have to consider the most typical set of facts regarding nontenured faculty, namely those who are denied tenure and are given a final year terminal contract.

When a nontenured faculty member alleges protected free speech activity prior to the institution's decision for termination that the activity was a substantial factor in his termination, the institution has the responsibility of showing by a clear preponderance of the evidence that the faculty member would not have been renewed in any event.[14] A critical question addressed by every court is determining whether the activity is protected free speech.

The following kinds of activity have been held to be nonprotected speech: uncooperativeness represented by failure to follow requisition procedures, use of improper language to a secretary, criticism of a program and its students in the presence of other students, rudeness to a staff member, refusal to accept a reassignment in classes;[15] and lack of public concern[16] in faculty member activities such as an administrative appeal to change employment status from "faculty" to "classified,"[17] or criticism of the dean and department chairman.[18]

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11. 464 N.Y.S.2d 953 (N.Y. Sup. Ct. N.Y. County 1983)

12. *Id.* at 955.

13. *See* Pauk v. Board of Trustees of City Univ. of New York, 654 F.2d 856 (2d Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982)

14. These elements constitute the *Mt. Healthy* doctrine.

15. Hillis v. Stephen F. Austin State University, 665 F.2d 547 (5th Cir. 1982).

16. *See* Connick v. Myers, *supra* note 9 and accompanying text. The Connick Court observed that:

> While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the first amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs. *Id.* 103 S. Ct. at 1691.

17. Cook v. Ashmore, 579 F. Supp. 78 (N.D. Ga. 1984)

18. Landrum v. Eastern Kentucky Univ., 578 F. Supp. 241 (D. Ky. 1984). The *Landrum* Court concluded that none of plaintiff's following activities were protected free speech:

The following kinds of speech have been held to be protected speech: advising a student to seek legal advice regarding his suspension from the college;[19] appeal to the AAUP for representation and relief in the matter of a course assignment;[20] written criticisms of the college administration's handling of maternity leave;[21] general nonresponsiveness of an institution to teacher needs;[22] and refusal to prepare an outline for a course the plaintiff was not teaching at the time.[23]

Whether or not plaintiff teachers can establish proof of protected free speech activities, they are still entitled under the due process clause of the fourteenth amendment to a hearing on reasons for termination if they have a protected property or liberty interest. A protectable property interest is difficult to find where the faculty member does not have tenure.

In *Wells v. Doland*[24] a faculty member issued a terminal contract had not acquired *de facto* tenure merely because he had been recommended on two occasions for tenure by the dean of his school. The court observed that plaintiff's "mere subjective expectancy of continued employment, even though he had not attained the required years of service for tenure, did not give him the constitutionally protected property interests necessary to involve the fourteenth amendment's procedural due process provisions."[25]

In *Hillis v. Stephen F. Austin State University*[26] the trial court found that a nontenured faculty member "had no legitimate claim of entitlement to or property right in continued employment."[27] How-

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(1) he turned down the real estate chair;
(2) he made suggestions in a faculty curriculum meeting about the proposed real estate program;
(3) he ran for political office;
(4) he criticized defendant Thompson for refusing to allow a woman to lead a prayer at a faculty meeting.
(5) he wanted to teach certain materials but his superiors disapproved of them;
(6) he allegedly made derogatory comments concerning his academic department's real estate program to an outsider, Realtor Russ Major;
(7) he criticized defendants Dean Thompson and Department Chairman Mullen in meetings with the "lunch bunch," a group of dissident faculty members;
(8) he wrote a highly critical 11-page letter dated February 7, 1976, which he circulated to defendants Thompson, Mullen, and faculty members.

[19] Stern v. Shouldice, 706 F.2d 742 (6th Cir. 1983)

[20] Hillis v. Stephen F. Austin State Univ., *supra* note 15.

[21] Daulton v. Affeldt, 678 F.2d 487 (4th Cir. 1982)

[22] *Id.*

[23] *Id.* at 489. The administration in nonrenewing plaintiff considered plaintiff's comments to represent "a hostile and uncooperative attitude."

[24] 711 F.2d 670 (5th Cir. 1983)

[25] *Id.* at 675.

[26] 665 F.2d 547 (5th Cir. 1982).

[27] *Id.* at 552.

ever, the court tied plaintiff's lack of a fourteenth amendment property right claim to his "unsatisfactory professional performance and abrasive personality."[28] The court appears to be suggesting that plaintiff would have had a continued employment entitlement deserving of due process protection if there had not been evidence of unsatisfactory professional performance.

In *Harrison v. Ayers*,[29] a faculty member who had signed six two-year contracts had no protectable property interest because the college did not have tenure:

> Property interests are not formed in a vacuum but must stem from an independent source such as state law rules or understandings that secure benefits and that support claims of entitlement to those benefits.[30]

A nontenured faculty member has a fourteenth amendment liberty interest in his "freedom to work and earn a living."[31]

> When a public employer, in refusing to rehire an employee, makes charges against him that might seriously damage his standing in the community or otherwise imposes a stigma on the employee that forecloses his freedom to take advantage of other employment opportunities, the employee's liberty interest may be implicated and he should be granted the opportunity of a hearing to his name.[32]

The terminated faculty member has the burden of proving that the charges against him were false and that they were of the sort which might damage plaintiff's standing in the community or foreclose his freedom to take advantage of other employment opportunities.[33] Where adequate notice of one year is given a faculty member to find a new position, one court seemed to indicate as a matter of law that any reputation damage would be minimal and thus there was no deprivation of ~~a~~ liberty interest.[34] Moreover, where tenure policy requires a unanimous committee vote of "excellent" before tenure will be recommended, failure of a nontenured faculty member to receive such a vote does not amount to a judgment of incompetency and therefore the faculty member has not been stigmatized.[35] Likewise, removal of a dean, a nontenured position, for ineffectiveness as an administrator and improper performance of duties and his return to the classroom as a tenured faculty member, does not involve allegations of moral turpitude so as to stigmatize him.[36]

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[28] *Id.*

[29] 673 F.2d 724 (4th Cir. 1982).

[30] *Id.* at 725, *quoting* Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

[31] Wells v. Doland, *supra* note 24, at 676.

[32] *See* Board of Regents v. Roth, 408 U.S. 564, 573-75 (1972).

[33] *See* Codd v. Velger, 429 U.S. 624 (1977); Sims v. Fox, 505 F.2d 857 (5th Cir. 1974).

[34] Harrison v. Ayers, *supra* note 29, at 725.

Colleges or universities which violate the constitutional rights of faculty in termination of contracts face the prospect of monetary judgments against the institution or its administrators. In *Daulton v. Affeldt,*[37] a $11,212 judgment against a technical institute was upheld when plaintiff was discharged for exercise of her free speech rights. Back pay can be recovered against a public educational institution on an equity theory[38] but back pay awards against school officials in their individual capacities are legal in nature.[39] As a result a terminated faculty member must specifically seek back pay from individual school officials in his pleadings or forego the possibility of such an award at trial.[40] However, if plaintiff's cause of action is founded upon violation of a liberty interest, one court has held that such a legal theory does not include reinstatement and back pay.[41]

The theory of plaintiff's claim may well determine the appropriate statute of limitations under state law. Where a plaintiff alleges breach of his employment contract in that independently guaranteed rights have been violated the appropriate statute of limitation may be something other than contract.[42]

Lawsuits against state universities or boards of education may encounter difficulties under the eleventh amendment.[43] Whether an entity is considered to be an arm or instrumentality of the state and thus immune from lawsuits depends upon state law. Although most states have abolished sovereign immunity from tort claims, consent to be sued in state court does not necessarily imply consent to be sued in federal court in a section 1983 action.[44] For example, a state statutory requirement that a claim must be filed and disallowed by the requisite state agency before a court action is brought may serve to bar any action in federal court if the state requirement has not been satisfied.[45] However, a bar against an entity of the state would not necessarily bar suits against state officials.[46]

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[35] King v. Regents of Univ. of California, 189 Cal. Rptr. 189 (Cal. Ct. App. 1982).

[36] Hicks v. Stone, 425 So. 2d 807 (Cal. Ct. App. 1983).

[37] 678 F.2d 487 (4th Cir. 1982).

[38] Hildebrand v. Board of Trustees of Michigan State Univ., 662 F.2d 439 (6th Cir. 1981).

[39] Shirley v. Chagrin Falls Exempted Village Schools Bd. of Educ., 521 F.2d 1329 (6th Cir.), *cert. denied,* 424 U.S. 913 (1976).

[40] Stern v. Shouldice, 706 F.2d 742 (6th Cir. 1983).

[41] Wells v. Doland, *supra* note 24

[42] Pauk v. Board of Trustees of the City Univ. of New York, 464 N.Y.S.2d 953 (N.Y. Sup. Ct. N.Y. County 1983).

[43] "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

[44] Harris v. Arizona Board of Regents, 528 F. Supp. 987 (D. Ariz. 1981).

Termination of Tenured Faculty

Termination of tenured faculty tends to focus on the adequacy of cause for dismissal or the appropriateness of procedures prior to dismissal. However, other issues occasionally surface. In *Harris v. Arizona Board of Regents*,[47] plaintiff was offered a position at Arizona State University as a professor of English and director of the creative writing program. This offer contained a unique provision that plaintiff would receive tenure "automatically" in his third year of employment or sooner by mutual convenience. When the university presented plaintiff with a terminal contract for his second year, he brought a section 1983 lawsuit. Despite the existence of a formal tenure process, the court found that the extraordinary contractual circumstances of this case gave plaintiff a reasonable expectation of continued employment and thus entitled him to the same substantive standards and procedural protections as for regular tenured faculty. In so ruling the court found that the Dean of the College of Liberal Arts had apparent authority to offer tenure.

In *Walker v. Oregon State Board of Higher Education*[48] the court held that reassignment of plaintiff from her position as Head Science Librarian to a new position where she would no longer have supervisory responsibilities was not a "sanction for cause." Therefore, plaintiff was not entitled to the formal hearing used for disciplinary cases for tenured faculty. In treating this matter as a grievance instead of discipline the court observed that plaintiff "lost no salary, rank or privilege because of her reassignment."[49]

Saccini v. Dickinson State College[50] addressed the question of whether a tenure contract offered to a faculty member had to be full-time. The court held that awarding a half-time contract with tenure for an Instructor of Library Science did not violate the college's regulations regarding the requirement that either tenure or a terminal contract be awarded for the seventh year of employment. "Nothing in the rules or regulations of the College or the State Board of Higher Education indicates that [plaintiff] was automatically entitled to *full-time* tenure in her seventh year . . . ."[51] It should be noted that the reason for the half-time contract was declining enrollments in the School of Library Science and at least three of plaintiff's six prior contracts had the following statement: "This is a terminal contract due to enrollment trends."[52]

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[45] *Id.* at 995; *see* Ronwin v. State Board of Arizona, 663 F.2d 914 (9th Cir. 1981); Soni v. Board of Trustees of Univ. of Tenn., 513 F.2d 347 (6th Cir. 1975); Markowitz v. United States, 650 F.2d 205 (9th Cir. 1981).

[46] Alabama v. Pugh, 438 U.S. 781 (1978); Helfrich v. Pennsylvania, 660 F.2d 88 (3d Cir. 1981).

[47] Harris, *supra* at note 44.

[48] 674 P.2d 88 (Or. Ct. App. 1984)

[49] *Id.* at 90.

[50] 338 N.W.2d 81 (N.D. 1983).

When a faculty member has been awarded tenure, a frequently litigated issue concerns the reason or reasons for contract termination. A tenured faculty member clearly has the same constitutional protection for his exercise of free speech as would a nontenured faculty member. Like his nontenured colleague, a tenured faculty member "must show that his activities were constitutionally protected and that the activities constituted a motivating factor in the decisions to dismiss and suspend."[53] Defendant school "must demonstrate that the same employment would have been reached even if [plaintiff] had not engaged in constitutionally protected conduct."[54] Faculty comments about administration which have the effect of "irritating or even harassing the University's administration"[55] do not cause such speech to lose its first amendment protection.

Public comments to the press about the way a medical school is funded and administered concern matters of public importance and "clearly transcend mere academic bickering."[56] A dean removed by the president for referring to him as in need of "psychiatric help" and who publicly accused the president of being immoral, dishonest, and manipulative did not engage in constitutionally protected free speech.[57] The appeals court found that "plaintiff's conduct and utterances were significantly disruptive of good order at the college."[58]

Dismissals of faculty for immoral or unprofessional conduct always present difficult normative questions. In *Samaan v. Trustees of the California State University and Colleges*[59] a faculty member pleaded guilty to one count of grand theft for improper billing to Medi-Cal. The faculty member was required to repay $5,431.50 to the Medi-Cal program and pay a fine of $1,000. Upon learning of the conviction the president of defendant school initiated disciplinary action against plaintiff for violating the state education code[60] providing for dismissal, demotion or suspension for immoral conduct or conviction of a felony involving moral turpitude. Although a faculty committee found "no evidence of immoral conduct, unprofessional conduct, or dishonesty"[61] and recommended only a written reprimand, the president's subsequent decision to dismiss plaintiff was upheld by an arbitrator and the chancellor. The appeals court agreed with the president, the arbitrator, the chancellor and the trial court that "on the record it appears that [plaintiff] was in fact guilty of the crime of which he was convicted and his honesty was significantly impugned. Although reasonable minds might differ as to the appropriate sanction, the penalty of dismissal was not an abuse of discretion."[62]

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[51] *Id.* at 86.

[52] *Id.* at 82.

[53] Peacock v. Duval, 694 F.2d 644, 645 (9th Cir. 1982). *See* Mt. Healthy School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

[54] *Id.* at 645.

[55] *Id.* at 647.

[56] *Id.* at 648. *See* Pickering v. Board of Educ., 391 U.S. 563, 571-72 (1968).

[57] Russ v. White, 541 F. Supp. 888 (W.D. Ark. 1981), *aff'd,* 680 F.2d 47 (8th Cir. 1982).

[58] *Id.* at 47.

[59] 197 Cal. Rptr. 856 (Cal. Ct. App. 1983).

In *White v. Board of Trustees of Western Wyoming Community College District*,[63] a tenured faculty member was dismissed during the school year for having "engaged in conduct [with students] . . . which has been detrimental to the College and unbecoming your position at the College."[64] The objectionable conduct involved the consumption of alcohol and marijuana on field trips. The school board of trustees policy prohibited "the use, possession or sale of alcoholic beverages . . . at college sponsored or supervised functions."[65] Plaintiff's chief defense was that "the accepted community standard at Western Wyoming College . . . was alcohol consumption and drug use among students and others of the younger set."[66] In affirming the teacher's dismissal the court found plaintiff's defense refuted by the school board's policy and by applicable criminal statutes.[67]

Cases involving termination of tenured faculty at designated ages occasionally are reported. In *Spinak v. University of Akron*[68] a university rule mandating retirement at 65 was invalid for faculty members participating in the State Teacher's Retirement System which provided for a 70 year limit. Even where a faculty member is terminated for reaching age 70 he may have sufficient protectable due process reputational and property interests to notice and a hearing.[69]

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[60] Cal Educ. Code § 89535.

[61] Samaan, *supra* note 59, at 859. The committee also found "no nexus between plaintiff's actions and his fitness to teach."

[62] *Id.* at 866.

[63] 648 P.2d 528 (Wyo. 1982).

[64] *Id.* at 531.

[65] *Id.*

[66] *Id.* at 535.

[67] *Id.* at 539.

[68] 445 N.E. 2d 692 (Ohio Ct. App. 1981).

A different situation — frequently with similar results — occurs when a tenured faculty member is terminated for inadequate teaching. A faculty member who refuses to teach a course in his specialty area for which he is qualified can be dismissed following the appropriate due process hearing.[70] A faculty member who willfully absences himself from his classroom on an extended trip when previously denied permission to do so will find that the school has adequate cause to dismiss him during the school year for insubordination.[71] In refuting the faculty member's allegation of academic freedom, the court expressed a very basic rationale: "Teachers may not leave their classrooms unattended in order to exercise the right of free expression, as schools and classes cannot be conducted without someone being in charge."[72]

Where either tenured or nontenured faculty are entitled to procedural due process the following due process standards must be met:

(1) the right to be advised of the cause for termination in sufficient detail to fairly enable (the teacher) to show any error that may exist;

(2) the right to be advised of the names and the nature of the testimony of the witnesses . . . ;

(3) a meaningful opportunity to be heard . . . within a reasonable time; and

(4) a hearing before a tribunal that possesses some academic expertise and also possesses an apparent impartiality against the charges.[73]

Notice of nonrenewal to a continuing contract employee is not invalid when given later than the required contract date where the employee has more than one full year to the end of his terminal year contract and where he cannot show prejudice.[74] The questioned adequacy of the claims against a faculty member can be cured where he has adequate notice of charges and witnesses but plaintiff fails to take advantage of discovery procedures available.[75] Even should plaintiff be confronted with charges which he was not prepared to defend, his procedural rights will have been protected where he failed to request a continuance on the ground of surprise.[76] However, there must be adequate time between reception of notice of charges and the hearing to permit preparation of a defense; one day is not adequate.[77]

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[69] Reitzer v. Board of Trustees of State Colleges, 477 A.2d 129 (Conn. Ct. App. 1984).

[70] Smith v. Kent State Univ., 696 F.2d 476 (6th Cir. 1983).

[71] Stastny v. Board of Trustees of Cent. Washington Univ., 647 P.2d 496 (Wash. Ct. App. 1982).

[72] *Id.* at 504.

[73] Evitt v. Monroe, 590 F. Supp. 902 (W.D. Tex 1984).

The hearing accorded the faculty member does not violate procedural due process where the topic of consideration is plaintiff's misconduct and consideration of the misconduct of another faculty member is excluded.[78] But refusal of a board to discuss any of the charges will be considered prejudicial.[79] A duly called hearing tribunal is considered impartial unless there is evidence of actual bias by one or more members.[80] Mere acquaintance by hearing tribunal members does not disqualify them as decision makers and any opinions which a tribunal member has of the accused faculty member "must be with respect to the specific charges against the accused faculty member, not with respect to some unrelated matter."[81]

The mere fact that a college president both initiates the discipline process and also serves as part of the appeal process does not in itself disprove impartiality.[82] Where the president refrains from discussing the case with other administrators while the review is in progress and, where the president listens to and reads the relevant evidence in preparing his decision, there is no violation of procedural due process.[83] But attempts by a school dean to influence a chancellor's decision on appeal through ex parte communications will be considered improper since the chancellor's decision should be based only on evidence offered at the hearing.[84] Any hearing must occur after the faculty member has received notice and prior to determination; discussions between an administrator and a faculty member prior to the furnishing of charges will be considered too remote to provide the requisite due process.[85]

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[74] Boyce v. Umpqua Commun. College, 680 P.2d 671 (Or. Ct. App. 1984).

[75] White, *supra* note 63, at 535.

[76] *Id.* at 537. Plaintiff was expecting to defend against a charge of homosexuality but also encountered charges of alcohol consumption and drug use with students.

[77] Kempland v. Regents of Univ. of California, 202 Cal. Rptr. 275 (Cal. Ct. App. 1984).

[78] Russ, *supra* note 57 at 898.

[79] Kempland, *supra* note 77.

[80] Evitt, *supra* note 73 at 907.

[81] *Id.*

[82] Samaan, *supra* note 59 at 861.

[83] *Id.* at 864.

[84] Adelson v. Regents of the Univ. of California, 180 Cal. Rptr. 676 (Cal. Ct. App. 1982).

Some administrative practices may be so nefarious as to render a hearing meaningless. In *Smith v. Gwydin,*[86] a community college employee was ordered by his superior to sign a statement purportedly containing verbatim responses of the employee regarding certain activities. When he refused to sign the statement he was charged with insubordination and was dismissed. In the court's opinion the employee could properly refuse to sign an inculpatory statement which would have made a hearing irrelevent.

Contract Problems

The possible application of the above constitutional rights for public educational employees to private school faculty has to date been found in legal literature.[87] Courts have consistently refused to find state action in nonpublic schools. In *Rendell-Baker v. Kohn,*[88] the United States Supreme Court refused to find state action in a private school for maladjusted children. Despite a significant number of contacts between the school and state and federal agencies the Court rejected both the entanglement and public function theories in refusing to consider the constitutional claims of teachers allegedly discharged for exercising their first amendment rights of free speech.

However, in *Krynicky v. University of Pittsburgh,*[89] a federal appeals court utilized a "symbiotic relationship" theory to find that the University of Pittsburgh and Temple University were subject to section 1983 lawsuits by virtue of both being incorporated into the state system of higher education by statute. Despite attempts to distinguish *Rendell-Baker,* the *Krynicky* court raises anew the concern about the quantity and quality of state contacts which open private schools to constitutional rights.

The contract theory has been used to sustain many ways in which private school officials deal with faculty even though similar conduct in the public sector would have faced serious due process attacks.[90]

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[85] Jones v. Los Angeles Commun. College Dist., 702 F.2d 203 (9th Cir. 1983).

[86] 446 N.Y.S.2d 385 (N.Y. App. Div. 1982).

[87] *See* R. Mawdsley & S. Permuth, *Private Schools' Tax Exempt Status and Application of Section 1983,* School Law Update: Preventive School Law (Jones & Semler eds. 1984).

[88] 102 S. Ct. 2764 (1982).

[89] 742 F.2d 94 (3d Cir. 1984).

[90] *See, e.g.,* Bischoff v. Brothers of the Sacred Heart, 416 So. 2d 348 (La. Ct. App. 1982); Aronson v. North Park College, 418 N.E. 2d 776 (Ill. App. Ct. 1981).

"In private institutions, the written . . . contract, other institutional documents, and previous practices govern the rights of . . . faculty . . . . Public institutions, on the contrary, are governed not only by the contract but also by the constitutional prerogatives of the Fourteenth Amendment."[91] Contract questions for both public and private institutions are governed by state law.

Although most cases turning solely on contract issues involve tenure matters, other problems may also be presented. In *Roberts v. Wake Forest University*,[92] a person hired 16 months earlier as golf coach and associate athletic director attempted to use custom and usage to prove that his discharge as golf coach violated his contract since golf coaches serve for long terms. The court determined, however, that in North Carolina where a person is employed for an indefinite period of time such a contract is "an employment at will which may be terminated at any time by either party."[93]

The question as to the legal effect of documents outside the employment contract upon the interpretation of that contract has frequently been litigated. In *Kilcoyne v. Morgan*,[94] a public university faculty manual incorporated as part of the employment contract required a tenure decision following three probationary years of teaching. Plaintiff was notified that he would be rehired for a fourth year but, prior to completion of his third year he was informed that he would not be granted tenure nor given employment beyond the fourth year. Because a state court denied his contract claim under the sovereign immunity doctrine, plaintiff sought to establish that the school's failure to follow its procedural guidelines in the faculty manual would support a section 1983 claim. However, the federal appeals court held that, where a public university "gratuitously afforded tenure aspirants procedural safeguards not constitutionally mandated, deviations from those procedures would not support a claim under the Fourteenth Amendment and Section 1983."[95]

The mere reference to external documents will not necessarily create contract rights. In *Krasik v. Duquesne University*,[96] incorporations of the ABA standards and the AALS standards into plaintiff's annual contract as head law librarian was held not to have created a right to continued employment. Although the court noted that AALS may want to take some action against the university, the mere incorporation of the standards and the bylaws "do not convert the agreement into a contract for permanent employment, nor do the standards or bylaws require faculty review prior to the expiration of the term of the agreement."[97] Where there is disagreement between employment criteria of a department within the university and the university's faculty handbook, a court will consider the handbook to be "the basic authority."[98]

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[91] R. Hendrickson & B. Lee, Academic Employment and Retrenchment: Judicial Review and Administrative Action (ASHE-ERIC Higher Education Research Report 1983), at 83.

[92] 286 S.E.2d 120 (N.C. App. 1982).

[93] *Id.* at 123. The subject of employment at will is undergoing considerable judicial scrutiny. *See* M. Galvin, *Termination of the employee at will*, The Bench and Bar of Minnesota (April 1984), at 11. *See also* Claus v. Gyorkey, 674 F.2d 427 (5th Cir. 1982).

[94] 664 F.2d 940 (4th Cir. 1981).

[95] *Id.* at 942.

[96] 437 A.2d 1257 (Pa. Super. Ct. 1981).

If an external document is not referred to in an employment contract, a court will have to determine the extent of the contract. In *Clutts v. Southern Methodist University*,[99] plaintiff was promoted to associate professor by the board of trusees but her position was noted as "without tenure." The SMU bylaws provided that tenure would apply to professors and associate professors. The Texas appeals court refused to impose the bylaw upon plaintiff's contract because in Texas "an extrinsic document must be signed or referred to in the signed contract to be construed as part of the parties' agreement."[100] Since the SMU bylaws were not referred to in plaintiff's contract, they were not part of the contract.

Occasionally, issues arise regarding proper contract interpretation. In *Sucec v. Regents of University of California*,[101] an employee who received a dismissal notice filed a request for a grievance hearing 35 days after receiving the notice. Since the relevant handbook provided for 30 days from knowledge of an action to file a grievance the court presumed plaintiff was familiar with the handbook and dismissed her complaint.

In *Snowden v. Northwest Missouri State University*,[102] plaintiff received his termination notice on June 21, 1975, that the 1975-76 academic year would be his last. The faculty handbook required 12-months' advance notice prior to termination. Plaintiff argued that since the academic year ran from August through early May, he should have received notice prior to the end of the academic year. But the court determined that plaintiff's ten-month academic year was coterminous with his salary period (September through June) and therefore the June notice gave him 12-months' notice.

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[97] *Id.* at 1261.

[98] University of Hawaii v. University of Hawaii Professional Assembly, 659 P.2d 732, 733 (Hawaii 1983).

[99] 626 S.W.2d 334 (Tex. Civ. App. 1982).

[100] *Id.* at 336.

[101] 180 Cal. Rptr. 679 (Cal. Ct. App. 1982).

[102] 624 S.W.2d 161 (Mo. Ct. App. 1981).

When faculty members are terminated from public colleges or universities, section 1983 claims will be raised in addition to contract claims. Although a contract theory is the only one which will prevail at the present time in private colleges, there are at least two advantages to a plaintiff's desire for success under section 1983.

First, the kind of damage to good name, reputation, and integrity as violative of plaintiff's liberty interest appears to be less than the tort standard of proof in defamation. Where a nontenured public faculty member alleges that charges against him are false and that the charges have been made public he will be provided a hearing to refute the charges.[103] However, where defamation is the only recourse to a terminated faculty member the burden of proof is heavy. Communications within administrative channels will have a qualified privilege and plaintiff can prevail only by proving malice.[104] In addition, a terminated faculty member must also prove publication of the alleged defamation. However, the action of an administrator or board in terminating a faculty member will not be considered publication.[105]

A second reason for utilizing section 1983 would be the range of remedies available which might not be available under state law for violations of contract rights: damages against institutions and administrators for violating established statutory or constitutional rights;[106] back pay for violations of constitutional right[107] or statutory right;[108] damages for termination not in substantial compliance with procedures in the employee handbook,[109] and damages for mental anguish as a result of violations of due process.[110]

Financial Exigency

Dismissals based on financial exigency, unlike those for cause or disability, are impersonal; they are unrelated to the views of the dismissed teacher. A professor whose appointment is terminated because of financial exigency will not be replaced by another with more conventional views or better connections. Hence bona fide dismissals based on financial exigency do not threaten the values protected by tenure. *(Krotkoff v. Goucher College,* 585 F.2d 675 (4th Cir. 1978)).

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[103] Wells v. Doland, 711 F.2d 670, 676 (5th Cir. 1983).

[104] Snowden v. Northwest Missouri State Univ., *supra* note 102 at 168-69.

[105] Hicks v. Stone, 425 So. 2d 807, 813 (La. Ct. App. 1983).

[106] Stern v. Shouldice, 706 F.2d 742, 749 (6th Cir. 1983).

[107] Kempland v. Regents of Univ. of Cal., *See supra* note 77.

[108] Spinak v. University of Akron, 445 N.E.2d 692 (Ohio Ct. App. 1981).

[109] Piacitelli v. Southern Utah State College, 636 P.2d 1063 (Utah 1981).

[110] Jones v. Los Angeles Commun. College Dist., 702 F.2d 203, 207 (9th Cir. 1983).

Dismissal of faculty for reasons of financial exigency is a relatively new area of discussion and litigation in higher education. Factors such as a diminishing college-age population and decreased financial support from federal and state governments have caused universities to change planning models from the expansion paradigms of the 1950s to models reflecting fewer students. Along with fewer students is the concomitant need for fewer faculty members, including those who are tenured, and/or the discontinuance of programs in the university.

As in the case of dismissal for cause, public universities are responsible for adherence to constitutional requirements as well as contractual agreements defined through state legislative actions and materials such as catalogues and faculty handbooks. Absent state action, private colleges and universities are held responsible for matters of contract and relevant state legislation. As one source notes "(I)n applying state law to a suit brought by terminated faculty, state courts will generally examine the documented basis for the decisions, including financial facts and circumstances, enunciated policies, and faculty recommendations, as well as review other court decisions dealing with retrenchment."[111]

Essential to any decision of "financial exigency," in either the public or private sector, is an understanding of what the term means. Needless to say, differences do exist. Wilson[112] suggests that it "refers to a situation in which the financial problems facing an institution are so serious that they may constitute adequate grounds for dismissal of tenured faculty."

A far more rigorous and imposing definition is provided by the AAUP as part of its 1976 statement on *Recommended Institutional Regulations on Academic Freedom and Tenure.* This commentary suggests that financial exigency is an "imminent financial crisis which threatens the survival of the institution as a whole and which cannot be remedied by less drastic means." Absent specific contractual language aligning with the AAUP statement, courts have tended to move closer to the definition provided by Wilson.[113] What is clear, regardless of definition, is that states, governing bodies, and universities need to develop policies and procedures to anticipate a state of financial exigency in order to prevent major confrontation in the legal arena despite the "neutral" effect noted in *Goucher.*

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[111] Legal Desk Book for Administrators of Independent Colleges and Universities (K. Weeks ed. 1983) at IV-21.

[112] F. Wilson, *Financial Exigency: Examination of Recent Cases Involving Lay off of Tenured Faculty.* 4 J. of College & U.L. 189 (1978).

The Public Sector

Cases involving financial exigency in the public sector have dealt with both first amendment and, predominantly, fourteenth amendment issues. First Amendment issues have been raised in the case of *Duarte v. Mills,*[114] where the court ruled that the dismissal of a community college Spanish instructor for "exigent" reasons was, in fact, dismissal for actions guaranteed under the freedom of speech clause.

Concern with first amendment rights also developed in *Mobey v. Reagan.*[115] In this case a nontenured philosophy faculty member was non-renewed but suggested that his dismissal was based on disagreements with other faculty members in the academic senate and not an overstaffed department as the college claimed. In remanding the case for further finding of fact, the appellate court noted a warning for all who would dismiss under "exigency" without appropriate constitutional understanding:

> (W)e emphasize that the trier (of fact) must be alert to retaliatory terminations . . . whenever the state terminated employment to quell legitimate dissent or punishes protected expressive behavior, then termination is unlawful.

Fourteenth amendment issues are particularly of concern when the dismissal involves tenured faculty members. These faculty have a right to due process given their property interests as noted in such cases as *Roth.*[116]

Perhaps the leading case involving questions of due process is *Johnson v. Board of Regents of the University of Wisconsin.*[117] As a result of a biennial budget reduction in 1973-75 made to the Wisconsin system, thirty-eight tenured faculty members on six campuses of the university were dismissed. The dismissals were made under a state statute that employment for the tenured professors was "permanent, desiring efficiency and good behavior" and "may not be terminated involuntarily except for cause."[118]

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[113] *See* Kelly, Michael & Kitabchi, Financial Exigency and Faculty Dismissals: Guidelines for University Dismissals (Paper presented at the Annual Meeting of the Association for the Study of Higher Education March, 1983), at 27.

[114] No. C-C-76-230 (W.D.N.C. March 6, 1979).

[115] 537 F.2d 1036 (9th Cir. 1976).

[116] Board of Regents v. Roth, 408 U.S. at 566, 577.

[117] 377 F. Supp. 227 (W.D. Wis. 1974), aff'd, 510 F.2d 975 (7th Cir. 1975).

Each chancellor was responsible for describing how the budget reduction would take place and notified each faculty in May 1973 of non-renewal effective June 1974. The board of regents established a reconsideration process for the proposed layoffs once the chancellors had made their decision. In this process:

a. each affected faculty member would be given a written description of the Regents' reconsideration procedures;

b. at the request of the affected faculty member, a written explanation of the reason or reasons for layoff would be provided by the appropriate department chair or college dean;

c. the faculty member might then request the convening of a "reconsideration committee." The committee was to consist of at least five tenured faculty, to be appointed by the chancellor with advice from the faculty governing body. No person who took part in the original decision to lay off a given faculty member could sit on this committee;

d. the committee was to submit its findings and recommendations to the chancellor who, within ten days, was to inform the faculty member of his decision in writing. The decision of the chancellor was final; and

e. in its deliberations, the reconsideration committee was limited to two areas of inquiry — whether there was enough evidence to support the decision to lay off, and/or whether there had been a material deviation from the procedures, established by the president and chancellor, of determining the fiscal and programmatic needs of the university, including the procedures of identifying the persons to be laid off.

The dismissed faculty, Johnson and others, filed suit in United States district court alleging denial of minimal procedural due process on two grounds, namely (1) the property interest in tenure was being denied by the action taken; and (2) the decision-makers —

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[118] Wis. Stat. § 37.31.

chancellors at five of the campuses and reconsideration committees on one — were not neutral or impartial. In rendering its decision, the district court noted that it is the responsibility of the university, and not the courts, to determine when layoffs might be mandated. It further acknowledged that the professors did have a property interest, even absent statutory recognition of the fact. In this case, the court distinguished between an apparent higher level of due process needed for discharge in an "adjudicating" situation (e.g., poor performance, unpermitted conduct) and cases such as this, in which "legislative decision might affect an individual property interest without being directed specifically at such interest," that is to say, procedural safeguards are less exacting and demanding in cases of financial exigency than those of discharge for cause.[119]

In rejecting the plaintiffs arguments regarding the property interest question, Judge Doyle stated:

> (S)o far as the 14th Amendment is concerned, a tenured teacher in a state institution is protected substantially — so to speak — only from termination or layoff for a constitutionally impermissible reason (such as earlier exercise of First Amendment freedom of expression, or race or religion), and from termination or lay off which is wholly arbitrary or unreasonable. The Fourteenth Amendment requires only those procedures which are necessary to provide the tenured teacher a fair opportunity to claim this "substantive protection."[120]

Regarding the second argument, Judge Doyle responded that "it is well within the process of the state, so far as the federal constitution is concerned, to assign to the chancellors of the respective campuses the authority both to make the initial decision to lay-off specific tenure faculty members and to make the ultimate decision."[121]

Of significant interest are the listing of four essential statements regarding minimal procedures that Judge Doyle suggested must be met. They were (a) furnishing each plaintiff with a reasonably adequate written statement of the basis for the initial statement to lay off, (b) furnishing each plaintiff with a reasonably adequate description of the manner in which the critical decision has been arrived at, (c) making a reasonably adequate disclosure to each plaintiff of the information and data upon which the decision-makers had relied;

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[119] Permuth, & Mawdsley, *Financial Exigency in Higher Education,* 4 Educ. L. Rep. 1 (1982).

[120] 377 F. Supp. 227, 239 (W.D. Wis. 1974).

[121] *Id.* at 240.

and (d) providing the plaintiff the opportunity to respond.[122] The opinion of the district court was affirmed by the Seventh Circuit Court of Appeals in 1975 without opinion.[123]

In other key public higher education cases, there has been a great tendency to focus on the procedural guidelines established in *Johnson.* In *Levitt v. Board of Trustees of Nebraska State College,*[124] legislative budget reductions led to the dismissal of tenured faculty at Peru State College. Finding that objective criteria were used and that no attempt was made to characterize any of the dismissed faculty as incompetent, the court commented that the plaintiffs were afforded adequate due process. As in *Johnson,* the court stated that it is the province of the schools to note which faculty should be released and that the process should be reasonable and fair. Similarly, the dismissal of a tenure faculty member from a Colorado public college was upheld, even with the retention of a nontenured faculty member in the same department when the decision was made "to meet the needs of the department, was based on substantial evidence, and was made in good faith."[125]

The Private Sector

In the private sector, those cases of particular note emphasize the need for universities to carefully plan for their future rather than react to it. The first and perhaps most important case is that of *AAUP v. Bloomfield.*[126]

The Bloomfield College Board of Trustees declared a state of financial exigency and gave one-month's notice to eleven tenured and two nontenured faculty. Further, the remaining fifty-four faculty members were informed that they were on one-year terminal contracts with "selective hiring" to occur for those returning for following years.

The American Association of University Professors, the bargaining agent for the faculty, brought suit based on violation of contract. AAUP maintained that financial exigency was not at hand and the actions of the board were to eliminate tenure. In addressing the suit, the court carefully studied the policy statements of the contract. The specific provisions noted were:

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[122] *Id.*

[123] 510 F.2d 975 (7th Cir. 1975).

[124] 376 F. Supp. 945 (D. Neb. 1974).

[125] 589 F.2d 475, 477-578 (10th Cir. 1978) (as noted in *Kelly*).

[126] 129 N.J. Super. Ct. App. Div. 249, 322 A.2d 846 (1974). *aff'd,* 136 N.J. Super Ct. App. Div. 249, 346 A.2d 615 (1975).

> (A) teacher will have tenure and his service may be terminated only for adequate cause, except in case of retirement for age, or under *extraordinary circumstances* because of financial exigency of the institution. Paragraph C(3) [emphasis added]

> Termination of continuous appointment because of financial exigency of the institution must be *demonstrably bona fide.* A situation which makes drastic retrenchment of this sort necessary *precludes expansion of the staff at other points at the same time, except in extraordinary circumstances.* Paragraph C(6) [emphasis added]

On each point, the court argued that the college had overstepped its own authority. First, the major problem was cash flow which could be met in other ways save dismissal of the faculty (e.g., sale of valuable real property). Second, the preponderance of evidence suggested that the new "direction" for the college was vague and the real reason for dismissal was to eliminate tenure. The appellate court agreed with the trial court regarding the issue of tenure, but suggested that it erred in terms of defining too narrow a definition of exigency:

> In our opinion, the mere fact that this financial strain existed for some period of time does not negate the reality that a "financial exigency" was a fact of life for the college administration within the meaning of the underlying contract. The interpretation of "exigency" as attributed by the trial court is too narrow a concept of the term in relation to the subject matter involved. A more reasonable construction might be encompassed within the phrase *"state of urgency."* In this context the evidence was plentiful as to the proof of the existence of the criterion of the financial exigency required by the contract.[127]

A strikingly similar decision to the appellate court decision in *Bloomfield* was reached in *Krotkoff v. Goucher College.*[128] When the issue of whether endowment needed to be expended before termination of tenured faculty was sought, the court noted that "(T)he expenditure of financial exigency should be determined by the adequacy of the College's operating funds rather than its capital assets."[129] The court noted that the college used reasonable standards in selecting faculty to terminate and reasonable measures to seek alternative employment for those dismissed.

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[127] Permuth & Mawdsley, *supra* note 119.
[128] 585 F.2d 675 (4th Cir. 1978).
[129] *Id.* at 681.

The question of whether financial exigency must be institutional or restricted to a college or department was addressed in *Schreuer v. Creighton University.*[130] In *Schreuer,* the court felt the judgment of the administration to terminate a member of the pharmacy college based on the status of that particular unit was justified. Absent the specific restrictive language of the AAUP 1976 RIR statement as noted above, the court suggested that the university was justified in implementing layoffs.

Conclusion

Termination of faculty can be for disciplinary as well as non-disciplinary reasons. Such termination can affect tenured or nontenured faculty and occur at public or private institutions of higher education. Although most of the litigation involving dismissal of faculty involves public universities, it can reasonably be expected that private schools will become increasingly affected as declining enrollments require reduction in faculty. Where faculty are to be dismissed for other than financial reasons considerations of the following procedures may help in minimizing the prospect for litigation:

(1) Review employee handbooks and personnel policies to insure that the wording is clear and specific.

(2) Review all documents of employment, including personnel policies, application forms and handbooks to insure consistency on all material points.

(3) Set up a grievance procedure to review all employment decisions, including discharge, and objectively review it to determine if it would appear fair to a jury. Institute personnel prodecures to inform faculty of the availability of the grievance procedure and to insure that the grievance procedure is rigidly followed.

(4) Review the performance appraisal system. Train the appraiser to give an honest and objective appraisal. Insure that the appraiser is in a position to evaluate the faculty member's performance and that the characteristics appraised are job

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[130] 260 N.W. 2d 595 (Neb. 1977).

related. Give the faculty member an opportunity to review and discuss the completed appraisal; however, the evaluator involved must be trained to avoid the types of generalized comments which might be alleged as a promise or contract of continued employment.

(5) Review job termination procedures. Each faculty member's file should be reviewed by the appropriate person before termination is initiated. Give faculty members the correct reason for termination.

Where the reason for termination of faculty is financial exigency, institutions and faculty would be well-advised to develop policies regarding such an eventuality before it occurs. In doing so, concentration should be placed on:

(1) criteria to be used in declaring a state of exigency;

(2) criteria used to dismiss tenured faculty;

(3) procedures to be used;

(4) means for appeal and a fair hearing after a decision is made; and

(5) resources to aid retrenched faculty in seeking other positions within and outside the given institutions.

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Minimum Competency Testing: A Review of the Case Law

Diana Pullin

During the past five years, state and federal courts have become involved in legal decisions heavily interwoven with thorny education and public policy implications when they have decided cases involving minimum competency testing. However, unlike the situation in so many of the school law cases in the recent past which have addressed the complex interplay between legal, educational, and political issues in the context of civil rights claims, student challenges to minimum competency tests have involved claims not only on behalf of members of protected minority groups, but also on behalf of all public school students. While most of these lawsuits have addressed the implications of the use of minimum competency testing to make critical determinations about students such as the award of high school diplomas or the determination of class placement, a new series of these lawsuits can be expected to challenge the use of minimum competency tests to make critical decisions about teachers and other educational personnel.

As of the fall of 1984, forty states had by state mandate adopted some form of student minimum competency testing; in the other ten states, local initiatives had implemented such testing programs on the school district level. Five states were using competency tests to determine grade-to-grade promotion. Nineteen of the forty states engaged in minimum competency testing are either currently using, or will in the next six years use, student test performance to determine either the award of a high school diploma or the type of high school diploma awarded.[1] In thirty-six states, some form of teacher competency testing has been mandated and all fourteen of the other states are considering the addition of teacher competency test requirements.[2]

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[1] Education Law Center, Education Commission of the States Clearinghouse Update (July 1984), Pipho & Hadley, State Activity: Minimum Competency Testing.

[2] Education Law Center, Education Commission of the States, Working Paper LEC-84-6 (Oct. 1984), Lines, Teacher Competency Testing: A Review of Legal Considerations.

While the total number of state and federal court decisions concerning the use of student competency testing has been small, the impact of those decisions has been significant. The landmark federal court litigation concerning the Florida functional literacy test used to determine the award of high school diplomas, *Debra P.* v. *Turlington,*[3] has been widely discussed and described in educational journals.[4] However, other lawsuits have pursued quite different legal theories from those addressed by the courts considering the Florida challenge. The lawsuits concerning the use of minimum competency tests to determine diploma awards have ranged from state court challenges under state administrative procedures acts to state and federal court challenges under state or federal constitutional equal protection or due process theories, challenges under title VI of the Civil Rights Act of 1964,[5] the Equal Educational Opportunities Act,[6] section 504 of the Rehabilitation Act of 1973,[7] and the Education for All Handicapped Children Act.[8]

While a number of lawsuits were filed in the early 1970's concerning the use of examinations to make decisions about teacher certification, hiring, salaries, and dismissal, these suits were of limited precedential value in determining the outcome of the student testing cases. The teacher competency test litigation filed to date has focused primarily upon use of state and federal equal protection clauses and upon title VII of the Civil Rights Act of 1964 which applies only to employment tests.[9] Given the increased uses of teacher competency testing now being proposed, however, these cases assume renewed importance in assessing the potential for successful legal challenges to the new teacher testing programs.

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[3] 474 F. Supp. 244 (M.D. Fla. 1979), *aff'd in part, vacated and remanded in part,* 644 F.2d 397 (5th Cir. 1981), *reh'g en banc denied* 644 F.2d 397 (5th Cir. 1981), 564 F. Supp. 177 (M.D. Fla. 1983), *aff'd,* 730 F.2d 1405 (11th Cir. 1984).

[4] *See, inter alia,* Benjes, Heubert, & O'Brien, *The Legality of Minimum Competency Test Programs Under Title VI of the Civil Rights Act of 1964,* 15 Harv. Civil Rights-Civil Liberties No. 3 (Winter 1980); *Education and the Law: Functional Literacy Program — a Matter of Timing, Debra P. v. Turlington,* 474 F. Supp. 244 (M.D. Fla. 1979), 10 Stetson L. Rev. 125-39 (1980); *Functional Literacy Testing and the Denial of High School Diplomas in a Post-Desegregation Setting: Debra P. v. Turlington,* 33 Rutgers L. Rev., 564-98 (1981): The Courts, Validity, and Minimum Competency Testing, (Madaus ed. 1983); Popham & Lindheim, *Implications of a Landmark Ruling on Florida's Minimum Competency Test,* 63 Phi Delta Kappan 18-20 (September 1981); A Paper prepared for the Education Commission of the States (October 15, 1979), Tractenberg, Legal Implications of Minimum Competency Testing: Debra P. and Beyond.

[5] 42 U.S.C. § 2000d.

[6] 20 U.S.C. § 1703.

[7] 29 U.S.C. § 794.

[8] 20 U.S.C. § 1401.

[9] 42 U.S.C. § 2000e.

The balance of this chapter presents an examination of the legal theories asserted in the courts to date in lawsuits challenging minimum competency testing of teachers and students and will describe the extent to which those theories have been employed successfully by plaintiffs.

Student Competency Testing

State Administrative Procedures Act Challenges

The primary challenges presented to date concerning the implementation of a statewide minimum competency testing program used to determine the award of high school diplomas were filed against the testing program implemented in Florida as a result of the Florida Educational Accountability Act 1976.[10] The Florida Accountability Act spawned a series of lawsuits, in both the state and federal courts, challenging the imposition of two new high school graduation requirements — a test of basic skills achievement and a demonstration of proficiency in functional literacy. The basic skills requirement became a one-time-only examination for high school students; those who failed the basic skills test (later termed the Florida Statewide Student Assessment Test I, or SSAT-I) were subjected to local school district mechanisms for determining whether basic skills proficiency had been achieved. The second requirement, as implemented by the Florida Department of Education, resulted in a second examination, the functional literacy test (or SSAT-II), which students had to retake until they passed. The first litigation addressing the Accountability Act challenged the procedure whereby the Florida State Board of Education established the passing score for determining successful performance on the basic skills test.[11]

A state administrative hearing officer had determined that the scoring criteria for determining successful performance on Florida's high school basic skills test, which was used as part of the high school graduation requirement, was a "rule" under the terms of the Florida Administrative Procedures Act,[12] and that the state's failure to follow the Florida Administrative Procedures Act in establishing the passing score for the basic skills test required invalidation of the rule. On appeal to an intermediate state appellate court, the hearing officer was reversed on grounds, *inter alia,* that determination of whether a particular student will be considered to have met high school proficiency standards is an issue not intended by the legislature to be covered by the Administrative Procedures Act. Standard-setting, according to the court, is properly left to the State Commissioner of Education, to whom the legislature had in the Educational Accountability Act delegated authority to establish the criteria for high school graduation tests.[13]

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[10] Fla Stat. 229.57.

[11] Flordia State Board of Educ. v. Brady, 368 So. 2d 661 (Fla. Dist. Ct. App. 1979). In related litigation, the rules were upheld in the face of a due process challenge to the promulgation of the rules. Brady v. Turlington, 372 So. 2d 1164 (Fla. Dist. Ct. App. 1979).

[12] Fla. Stat. 120.52 (14).

Although not presented under a state administrative procedures act, related litigation in California challenged one local school district to meet a statutory requirement imposed in the state's minimum competency testing statute requiring citizen participation in each district's formulation of its minimum competency standards.[14] The case was later settled after the school district agreed to set new proficiency standards according to the public participation requirements of the California statute.[15]

The challenges to competency testing requirements based upon narrow state administrative procedures acts or related statutory procedural challenges have had limited visibility and even more limited success. The problems attendant with such challenges are obvious. The lawsuits address fairly superficial procedural issues concerning the implementation of the testing requirements and do not address the underlying educational and public policy concerns some have raised about minimum competency test requirements. Finally, these types of challenges can all be easily overcome by the public officials administering the programs who can tinker with the mechanisms until the procedural flaws in the system are eliminated.

State or Federal Equal Protection Challenges

The more significant litigation concerning minimum competency testing of students has presented two primary sets of equal protection claims — those put forth on behalf of black students asserting that blacks are discriminated against in testing programs on the basis of race, and those claims brought on behalf of "every student,"[16] asserting that testing programs fail to meet even basic rational relationship challenges. No court to date, however, has failed to find that the use of a minimum competency test to determine the award of high school diplomas bears a rational relationship to the legitimate state goal of fostering educational accountability. Successful equal protection challenges rested upon other theories or were asserted in conjunction with successful due process theories.

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[13] Brady, 368 So.2d at 662.

[14] Hernandez v. Board of Educ., Lynwood Unified School Dist., No SCC 01531 (Cal. Sup. Ct. Los Angeles County, 1980) Later, a group of plaintiffs represented by the same legal counsel filed a new state court challenge as taxpayers protesting the state statutory provisions allowing each local school district to establish its own proficiency standards. Barber v. Board of Educ. of the State of California, No. C 340963, (Cal. Sup. Ct. Los Angeles County, 1980). This complaint alleged that the statutory scheme for local decision-making violated equal protection of the laws in creating a classification scheme where students could fail to meet the proficiency standards in one school district and be denied a regular high school diploma but might receive a diploma by another district in the state having met the same standards. Among the types of relief requested in the case was a declaratory judgment that only the state board of education could set proficiency standards for the state. The case was perhaps at least partially mooted out with the enactment in 1981 of Assembly Bill 1446, ch. 267, which created mandatory reciprocity between school districts so that persons passing a test in one district would not have to pass another test when they moved to a new district.

[15] Cal. Educ. Code § 51215 (1980).

The impact of minimum competency tests upon black students was not altogether unexpected, given the history of student performance on most standardized measures of educational achievement. In fact, the results were perhaps more devastating for all youth, particularly black youth, than had been initially projected. For example, in the first administration of the functional literary test in Florida in October 1977, 27% of the black students taking the test failed and 24% of the whites taking the test failed.[17] In October 1978, functional literacy performance by black students compared to whites was such that black students had ten times greater failure rate than did whites.[18] By 1983, test performance among Florida high school students on the functional literacy test had improved considerably.[19] However, racial disproportions persisted. while 20% of the total student population was black, 57% of the students failing the functional literacy test were black.[20] Similar statistics have been presented concerning the local school districts minimum competency testing program in Tatnall County, Georgia. In Tatnall County in 1978, the district's students had an overall failure rate of 14% on the measure being used in the district as the minimum competency test (the California Achievement Test), with 57% of these failures being black.[21] In 1979, 83% of the Tatnall County students failing the test were black and in 1980, 100% of the students failing the Tatnall County test were black,[22] although the overall proportion of blacks in that school district's population was 30.8%.[23]

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[16] Clague, *Competency Testing and Potential Constitutional Challenges of Every Student,* 28 Catholic U.L. Rev. 469 (1979).

[17] 474 F. Supp. at 249.

[18] *Id.*

[19] 564 F. Supp. at 180.

[20] *Id.* at 186.

[21] *Johnson* v. *Sikes,* 730 F.2d 644, 645-46 (11th Cir. 1984).

[22] *Id.*

[23] Anderson v. Banks 520 F. Supp. 472, 478 (S.D. Ga. 1981), *modified* 540 F. Supp. 761 (S.D. Ga. 1982)

While the statistics indicating disparate impact of minimum competency testing requirements upon black students have been graphically clear, the extent to which past precedent would be useful in determining the race-based equal protection challenges was somewhat less clear. The issue has been addressed twice by the courts, in the *Debra P.* litigation in Florida and in the Tatnall County case.[24] In the first round of the litigation, the trial and then the appellate court deciding the case required a four year moratorium on the use of the test as a diploma sanction so that no students would be denied high school diplomas until all students had been a full twelve years of schooling in unitary school systems. The most recent decision in the *Debra P.* litigation adopts the standard first set forth in the *McNeal v. Tate* ability grouping case and holds that use of a test as a diploma sanction is permissible only where the state proves that either the disproportionate failure rate for blacks is not caused by the present effects of past intentional discrimination, or that the use of the test as a diploma sanction would remedy those effects.[25] The performance of black students on Florida's functional literacy test, although disproportionately low, was not found to be the result of past unlawful discrimination. Furthermore, the court determined, based upon expert testimony, that the diploma sanction would in fact work to remedy the vestiges of past intentional segregation by requiring students to pay closer attention to skills acquisition.[26]

Due Process Challenges

While the lines in the competency testing lawsuits between equal protection and due process analyses become blurred as they do in many such cases, due process challenges to the use of competency tests also have been successfully asserted. The initial question presented under constitutional due process provisions addresses whether property or liberty interests could be identified on behalf of the students bringing the challenges. Both such interests have been recognized by the courts. The definition of the property interest at issue has changed slightly from case to case. In the landmark litigation in Florida, both the federal district court and the circuit court of appeals defined a property interest consisting of a student's expectation of receiving a regular high school diploma according to the original standards and requirements for that diploma set out when the student commenced his educational career.[27] In the Tatnall County case, the district court defined that interest more broadly, finding a property interest in receipt of a high school diploma.[28] However, in a challenge to the use of test data to determine grade promotion and class placement in the Tuscalossa, Alabama school district which attempted to rely upon the standards set forth in *Debra P.* for defining the property interests at stake, some of the limits of the *Debra P.* holding were noted. In *Bester* v. *Tuscaloosa City Board of Education,*[29] the Eleventh Circuit declined to expand its *Debra P.* holding to recognize a property interest in grade promotion according to the standards which had originally been set out for students when those standards were later deemed to have been too low.[30]

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[24] Equal protection challenges to racial disproportions were also asserted in Iwanda H. v. Berry No. 80-0156, (W.D.N.C. dismissed) a challenge to a North Carolina competency test requirement. The case was voluntarily dismissed after it was determined that very few students failed the test and that most of these were students who had been enrolled in special education programs.

[25] 730 F.2d at 1414.

[26] *Id.* at 1416.

The liberty interest which has been found in the student competency testing cases has been identified on the basis of evidence indicating, as would be expected, that students who fail the competency test are stigmatized as a result of their poor test performance. In Florida, the trial court noted testimony that students who failed the test were perceived as "global failures."[31]

Once identification of the property and liberty interests at stake was completed, inquiry concerning the process due has focused on two different, albeit related, components of proper notice — time and substance. The courts have first raised questions about the sufficiency of warnings to students, educators, and parents of the impending new graduation requirements. They have next focused upon the instruction which must be offered in order to sufficiently prepare students to meet the new test requirement.

In calculating notice periods, the courts have looked not only at the time span between initial passage of new legislation requiring successful performance on a test and at the graduation day upon which diplomas will be denied, but also at the span of time between the point at which students and educators became aware of the specific skills and knowledge to be covered on the test and graduation day. In the Florida litigation, a thirteen month period between announcement of the skills and knowledge to be covered on the test and the first graduation day upon which the testing requirement would be imposed was found insufficient.[32] However, a district court addressing a challenge to the Tatnall County program found a twenty-four month period of notice was sufficient.[33] While the precise formula for calculation of notice periods is not clear, the courts have apparently taken into consideration such factors as evidence regarding the nature of the test being used and the extent to which there is evidence that the schools were in the past affording instruction in the skills and knowledge covered on the test, a matter addressed more completely in their analysis of the instructional issue discussed below.

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[27] 474 F. Supp. at 266.

[28] Anderson v. Banks, 520 F. Supp. 472, 504 (S.D. Ga. 1981).

[29] 722 F.2d 1514 (11th Cir. 1984).

[30] *Id.* at 1516.

[31] 474 F. Supp. at 258.

[32] 474 F. Supp. 244, *aff'd* 644 F.2d 397.

In the Tatnall County situation, in which a twenty-four month notice period was upheld, the test had been used in the district in the past and was a nationally-normed, standarized achievement test, the California Achievement Test (CAT). The Tatnall County graduation requirement imposed a standard whereby students had to achieve a grade equivalent of 9.0 on the CAT prior to graduation. In the Florida situation, however, a new, state-developed test was created under the statutory requirement. Further, a gubernatorial commission conducted hearings and received testimony around Florida prior to the implementation of the test sanction and reached the conclusion that the skills and knowledge covered on the test addressed materials that students "may or may not have been taught recently, well, or perhaps at all."[34] Here, the initial three-year phase-in of the test requirement originally contemplated by the 1976 act was postponed by court order and, in fact, it was not until the Spring of 1983 that diplomas were denied for the first time in Florida on the basis of student performance on the functional literacy test.[35]

As an outgrowth of the time-of-notice requirement, the courts have imposed a substantive standard under which the burden of proof has been placed upon defendant educators to establish that, when a test is used as part of a diploma requirement, the test is a measure of skills and knowledge that students have been "actually taught."[36] This requirement, which served as part of the basis for a four-year moratorium on the use of Florida's functional literacy test as a diploma requirement in the years from 1979 to 1983, was later described by the Eleventh Circuit as a standard which could be met with inferential evidence of instruction and with evidence of the effectiveness of remedial programs offered in the schools.[37]

The Seventh Circuit found that fourteenth amendment due process requirements applied to the Peoria testing program, given the stigmatizing effect of test failure in that district. It held, under the due process clause, that students in need of special education should be given sufficient notice of a minimum competency testing requirement to enable them to have an adequate opportunity to prepare to meet that requirement. The court went on to find that, while the Peoria students had had notice of approximately one and a half years, this notice was insufficient because as much as 90% of the material covered on the district minimum competency test had not been included in the individualized educational programs (IEPs) formulated for the students.

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[33] 540 F. Supp. 765.
[34] 474 F. Supp. at 266.
[35] 730 F.d 1405.
[36] 644 F.2d at 405.
[37] 730 F.2d at 1410-11.

Challenges by Students with Handicapping Conditions

Perhaps the most complex series of legal and policy issues concerning the use of student competency testing to determine the award of high school diplomas has been presented in cases concerning students with handicapping conditions who have been enrolled in special education programs. These students have presented challenges based upon the legal theories asserted on behalf of "every student," but have in addition presented challenges to the test requirements which arise out of the provisions of the federal statutes concerning the education of handicapped students, the Education for All Handicapped Children Act (EAHCA) and section 504 of the Rehabilitation Act of 1973. The EAHCA provides federal financial assistance to states for educational services to students with handicapping conditions in need of special education and attaches to the receipt of that federal aid both procedural and substitive requirements concerning the provision of special education services; that statute has at its heart a requirement that handicapped students in need of special education receive appropriate, individually-tailored educational services in the least restrictive educational environment. The second federal statute, section 504, bars discrimination on the basis of handicapping conditions in any programs or activities receiving federal financial assistance.

States and local school districts have varied considerably over the years in the graduation requirements they impose upon special education students and in the nature of the diploma or certificate awarded to those students upon completion of their educational careers. None of the approaches employed in the past have provided clear guidance for determining how to include special education students in the new minimum competency testing requirements, particularly where the nature and extent of that participation must be determined in light of the federal statutory requirements described above.

Court challenges to diploma requirements, such as the successful performance on minimum competency tests by handicapped students, have focused upon several different issues. An initial question was presented concerning the extent to which students with handicapping conditions should be subject to the competency test requirement at all. In addition, courts have addressed the issue of adequacy of preparation for the test for students with handicapping conditions and the issue of accomodation of special needs in the administration of the tests.

All courts addressing the matter to date have held that the use of minimum competency tests to determine the award of regular high school diplomas to students with handicapping conditions is not per se unconstitutional nor per se in violation of the federal statutes concerning education of the handicapped. In dicta, the early cases indicated that there may be situations in which the use of competency tests to determine diplomas awarded to students with handicapping conditions might be unconstitutional or in violation of the federal statutes. In fact, such was the decision reached, on the basis of the federal statutes, in a federal case arising out of the challenge to the Peoria, Illinois testing program.[38] The courts have concluded that there are some students who will be denied diplomas on the basis of the competency test requirement as a result of the nature of their handicapping conditions. These students would very well have received regular high school diplomas before the test requirement was added.[39]

The Tatnall County, Georgia case involved a challenge to the test requirement on grounds that the testing program violated section 504 because students with certain kinds of handicapping conditions, particularly mental retardation, would not ever receive a diploma under the program. The argument of the students was that, given the nature of their handicapping conditions, some of them would never be able to pass a minimum competency test and would as a result never receive regular high school diplomas. The district court ruled that section 504 does not require the award of diplomas to handicapped students unable to meet the proficiency standards included in the minimum competency test. In so ruling, the court referred to the section 504 regulations, which suggest that different standards for students with handicapping conditions could be appropriate on the theory that they are "not otherwise qualified" to receive diplomas.[40] Section 504, in its statutory language, bars discrimination against "otherwise qualified" persons with handicapping conditions: "no otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." Note, however, that the implementing regulations for section 504 provide that "qualified handicapped person" means, for public elementary or secondary education," a handicapped person (i) of an age during which non-handicapped persons are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons, or (iii) to whom a state is required to provide a free appropriate public education under [the EAHCA]."[41] It appears, therefore, that a viable issue concerning the court's interpretation of section 504 might have been presented on appeal. No such issue on appeal was, however, raised.

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[38] Brookhart v. Peoria School Dist., 697, F.2d 182 (7th Cir. 1982).

[39] Board of Educ. of Northport-East Northport v. Ambach, 436 N.Y.S. 2d 564, 567 (N.Y. Sup. Ct. 1981), *rev'd* 458 N.Y.S. 2d 680 (N.Y. App. Div. 1982), *aff'd,* 469 N.Y.S. 2d 669 (N.Y. 1983).

The Seventh Circuit Court of Appeals, in a challenge to the Peoria testing program, held that the use of a minimum competency test to determine diploma awards to students with handicapping conditions does not constitute discrimination in violation of section 504. The challenge presented in the Peoria case rested upon the theory that the use of a minimum competency test to determine the award of high school diplomas constituted the use of a single procedure as a sole criterion for determining appropriate educational programs. Section 504 prohibits the use of a single test instrument to make decisions about the appropriate education for a handicapped student. The Seventh Circuit found that, since graduation requirements in the school district included not only successful completion of the test but also course and credit requirements, the test was not being used as the sole criterion for determining graduation.[42] A second section 504 challenge to the Peoria requirement asserted that students with handicapping conditions were entitled, under the federal statute, to an alteration in the content of the minimum competency test to accommodate the abilities of the students. Given the Seventh Circuit's interpretation of the "otherwise qualified" language in the statute, this assertion also failed. The Seventh Circuit did, however, require that accommodations of the administration of the examination be made for students otherwise qualified to successfully compete on the test. Such accommodations would not alter the content of the test but would offer accommodations in the administration of the test to students with handicapping conditions.[43]

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[40] 34 C.F.R. § 104.3(k)(2).
[41] 34 C.F.R. § 104.35(b)(2).
[42] 697 F.2d 182 (7th Cir. 1982).

Teacher Competency Testing

In the near future, it is probable that attention will focus not on student competency testing, but rather upon the use of competency tests to make critical determinations about teachers and candidates for teaching certificates. The current widespread popularity of proposals to foster excellence in public education will increase the possibilities of litigation given the punitive focus of many of the proposals, particularly those concerning educational personnel. The flurry of litigation concerning teacher testing, particularly cases in the early 1970's on the use of the National Teachers Examination, subsided substantially in the latter part of that decade, due in large part to the United States Supreme Court decision in *Washington* v. *Davis,* with its refusal to apply strict title VII standards to a police examination, and the resultant deferral to an equal protection analysis under which an intent standard was imposed.[44] This was followed by the Supreme Court's summary affirmance of the decision entered below in *United States* v. *South Carolina,* in which the National Teachers Examination was held to have been sufficiently validated for its use with teachers in that state to make salary and certification decisions.[45] In the early teacher testing cases where teachers achieved occasional victories, such as the decision in a Georgia case in which use of the NTE was found to violate even a rational basis standard under the equal protection clause,[46] the litigation in which teachers were most likely to succeed was litigation brought as a part of, or in conjunction with, school desegregation cases in which the teachers could establish that teacher test requirements worked to frustrate attempts to implement court-ordered desegregation of school faculties.[47] Teachers also have at times been able to establish that imposition of an NTE requirement arose from a discriminatory intent.[48]

Recent decisions indicate, however, that a new era may be dawning in judicial scrutiny of teacher testing practices. An August 1983 decision in a case challenging the Mobile County, Alabama school system's use of the NTE awarded a preliminary injunction against the use of the test to determine teacher dismissal when the cut-off score on the test excluded a disproprotionate number of black teachers. The Alabama court enjoined the use of the NTE largely on grounds that the Educational Testing Service, developer and marketer of the NTE, did not approve of the Mobile district's use of the test.[49] In another recent case, a court-approved settlement in July 1983 ended a North Carolina challenge to the use of the NTE as a teacher certification requirement; under the agreement, North Carolina will provide remedial assistance to individuals failing the test.[49]

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[43] *Id.*

[44] 426 U.S. 229 (1977).

[45] 445 F. Supp. 1094 (D.S.C. 1977), *aff'd,* 434 U.S. 1026 (1977).

[46] Georgia Ass'n of Educators v. Nix, 407 F. Supp. 1102 (N.D. Ga. 1976).

[47] Baker v. Columbus Municipal Sep. School Dist. 329 F. Supp. 706 (N.D. Miss. 1971), *aff'd.* 462 F.2d 1112 (5th Cir. 1972).

A new legal challenge to a teacher competency testing program was initiated as recently as this past month. Members of the Arkansas Education Association filed a state court challenge asserting that a recent statute requiring successful performance on a state-developed teacher competency test in order to obtain renewal of certification violates the terms of the state equal projection clause.[51] The challenge does not address the potential civil rights problems inherent in the Arkansas scheme, but instead poses a simple facial challenge to the provisions of the statute, which provides that the teacher competency test will be given only once (Spring 1985), and will only be required of certified educators then employed in Arkansas public schools. That group of educators will face the potential loss of their certificate while new educators, or those who were not working in the Arkansas public schools during the 1984-85 school year, will be exempt from the testing requirement.

Given the increased interest in the use of teacher competency tests, further litigation can be expected. In addition to the equal protection challenges presented, it is probably that, once the results of the new tests are in, civil rights challenges may be appropriate. It is possible that these future court cases may take a different turn than did the previous challenges to the use of the NTE, which is the property of the most sophisticated testing corporation in the world. Many of the new teacher competency tests are being developed at the state or local level or by private testing companies, where expertise and resources are often less available. Many of the new tests are also being developed under incredible time constraints, with the policymakers who mandate the tests allowing the test-makers very little time to ensure the validity and reliability of the tests. Finally, the civil rights issues presented in any new court challenges may well be quite different than those presented previously. In many of the jurisdictions in which teacher tests are being used, there has been a

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49. York v. Alabama State Bd. of Educ., 518 F. Supp. 779 (M.D. Ala. 1983).
50. *See* Lines, *supra* note 2, at 5
51. Stanfield v. Turnbow, No. 84-4892, (Ark. Chancery Ct., Pulaski County 1984).

long history of desegregation efforts. While many of these efforts have clearly been unsuccessful or have had mixed or limited success, the links between the teacher test and unlawful discriminatory purposes will be harder to establish as a matter of law although it is well to note that many of the educators who are now having difficulty on the tests were schoolchildren in the years before desegregation or during the era — which continues to the present day — in which the nation's public schools and universities are still struggling to eliminate racial discrimination in the educational process.

Conclusion

There are a large number of states that are now beginning to deny diplomas on the basis of student test performance. No new lawsuits have been filed by students recently, although serious expressions of concern have been raised about such programs as the one in Texas, where there are large groups of minority and limited-English-proficient students who can expect to be seriously disadvantaged by the test requirement. Perhaps more likely in the near future are suits brought by teachers against the teacher test requirements. The outcome of any such suits is highly uncertain given the wide variation in past precedents.

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Arbitrary and Capricious Nonrenewal Decisions

Robert E. Phay

Every spring, school boards must decide whether to renew the contracts of their probationary teachers. A school board has a legal and moral responsibility to appoint and reappoint only the best teachers it can. And in searching for the best, a board may choose not to reappoint an "average" or "satisfactory" teacher, when it believes that a better one can be found. For this reason, a nonrenewal is not an arbitrary act; in fact, a nonrenewal may be necessary if the board is to discharge its duty to put the very best teacher it can hire in the classroom.

In 1982, the author examined the right of the board to not renew an average teacher when it thinks it can find a better one.[1] That article raised but did not examine a more general question: to what degree is the school board limited by the requirement that it not be arbitrary or capricious in deciding not to renew a probationary teacher? This article will consider that question — the type of statutes that impose this limitation and court decisions that have ruled on whether a nonrenewal was arbitrary.

The Responsibility for Challenging the Nonreappointment and the Burden of Proof

Before examining the cases, it should be noted that when teachers have been notified that their employment contracts will not be renewed, they are responsible for initiating a review of that decision. Furthermore, if the school has a procedure for internal review,[2] the employee must request this review before he seeks judicial review. In an Alabama case, a federal district court addressed the question of who bears the burden of initiating a hearing. Citing the United States

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[1] *See* Phay, *Seeking Excellence: Not Reappointing an "Average" Teacher in Order to Employ a Better Teacher,* 4 Educ. L. Rep. 357 (1982).

[2] For a recommended board policy on nonreappointment, see R. Phay, Nonreappointment, Dismissal, and Reduction in Force of Teachers and Administrators: Proposed Board Policies (1982). It is highly desirable that procedures separate from the regular teacher grievance procedure be provided for nonreappointments, just as a separate procedure is used for discharge for cause.

Supreme Court's decision in *Board of Regents v. Roth,*[3] the court said that teachers who believe that their nonrenewal is impermissible must assert that claim and request a hearing in order to protect their "due process right." It is elemental, the court said, that some opposition to the nonreappointment be made before any obligation is placed on the school to observe due process requirements.[4] As the Mississippi Supreme Court recently said in rejecting a teacher's claim that her nonrenewal was arbitrary, "so long as the nonreemployment decision is not based upon an improper reason, the school board does not have to justify its decision for nonreemployment."[5]

The law also is clear that a teacher who alleges that a nonrenewal decision was based on an impermissible reason has the burden of proving that allegation. The Fifth Circuit Court of Appeals, in a case in which a school district refused renewal of two probationary faculty so that it could "upgrade its faculty and academic standing," said that "neither the burden of going forward nor the burden of proof shifts to the state until it has been established by the complainant" that the nonrenewal was based on his exercise of constitutional rights.[6] Moreover, the Supreme Court said in *Mt. Healthy v. Doyle*[7] that even if a faculty member can show that the board's decision not to reappoint was based in part on conduct of the teacher that is constitutionally protected, its decision will be sustained if it can show "by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct."[8]

The Fourth Circuit applied the *Mt. Healthy* ruling in *Mayberry v. Dees,*[9] a case involving the nonreappointment of a teacher who was up for tenure. The court said that a teacher cannot claim that his nonreappointment was unconstitutional merely by showing an exercise of first amendment rights, followed by a denial of tenure. That approach wrongly ignores the "manifold other requirements" to be satisfied before tenure is granted, some of which are independent of the candidate's qualifications.[10] "[I]f the possibility of retaliation were all Mayberry had to prove to allow a jury to find in his favor, there would be no practical way to deny tenure to anyone." If that were the case, the court said, the distinction between probationary and tenured employment "would largely evaporate."[11] The court also made clear that past satisfactory performance does not justify an inference that the teacher should now be given tenure. The court rejected this argument, saying that no favorable inference "is to be drawn from previous satisfactory, annually renewed probationary service."[12]

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[3] 408 U.S. 564 (1972).

[4] Stewart v. Bailey, 396 F. Supp. 1381, 1383 (N.D. Ala. 1975).

[5] Tanner v. Hazlehurst Mun. Sep. School Dist., 427 So. 2d 977, 980, (Miss. 1983). *See also* Cooner v. Board of Educ., 663 P.2d 1002, 1005, (Ariz. App. 1982), in which the court said that it would not review the reason given for the nonrenewal unless the reason was "so unreasonable, arbitrary and capricious and about which reasonable men would not differ." Arizona law requires that a reason be given for the nonrenewal.

[6] Fluker v. Alabama State Bd. of Educ., 441 F.2d 201, 206 (5th Cir. 1971). *Accord* Adams v. Campbell County School Dist., 511 F.2d 1242, 1246 (10th Cir. 1975).

[7] 429 U.S. 274 (1977), digested in 8 Sch. L. Bull. 11 (April 1977).

[8] 429 U.S. at 287.

[9] 663 F.2d 502 (4th Cir. 1981).

[10] *Id.* at 518.

Arbitrary Nonrenewal

In teacher nonrenewal decisions, the courts also have had to decide whether a nonrenewal of a probationary teacher's contract was arbitrary or capricious. Generally, a nonrenewal will be found "arbitrary and capricious" if it is made in bad faith,[13] is based on the teacher's exercise of first amendment or other constitutionally protected rights,[14] is unrelated to the educational process or to a reasonable educational objective,[15] is justified by reasons that are wholly unsupported in fact,[16] is based on reasons that are frivolous or trivial,[17] or is found to be an abuse of discretion.[18]

Statutes

The states' statutes (sometimes board policy) establish the school board's basis for teacher renewal. These statutes vary, and thus what is arbitrary in one state may not be arbitrary in another. For example, some states (like Alabama and Alaska) permit the board to refuse renewal for any reason other than a constitutionally impermissible one.[19] California, however, requires that the nonrenewal relate to the welfare of the schools and pupils.[20] Connecticut statutes require that the nonrenewal be for one of the six reasons for which a tenured teacher may be discharged,[21] although the board has no burden to prove the reason — the teacher must prove that the given reason was not the real reason.[22] And North Dakota grants instant tenure: before a teacher may be denied renewal, the school administrator must submit written reasons for the nonrenewal and then substantiate those reasons at a hearing on the nonrenewal.[23] Although none of these statutes give a school board unfettered discretion in its renewal decisions, most states give the board broad discretion to determine what is in the best interests of the school district and what is the best way to achieve the board's education goals.[24]

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[11] *Id.* at 519.

[12] *Id.*

[13] Jinkerson v. Lane County School Dist., 531 P.2d 289 (Or. Ct. App. 1975).

[14] Stoddard v. School Dist. No. 2, 590 F.2d 829 (10th Cir. 1979); Shatting v. Dillingham School Dist., 617 P.2d 9 (Alaska 1980).

[15] Drown v. Portsmouth School Dist., 451 F.2d 1106 (1st Cir. 1971); Lewis v. Tucson School Dist. No. 1, 23 Ariz. App. 154, 531 P.2d 199 (1975). *See* Berger, *Administrative Arbitrariness: A Synthesis,* 78 Yale L.J. 965, 999 (1969).

[16] Keith v. Community School Dist., 262 N.W.2d 249 (Iowa 1978). *See also* Unified School Dist. v. Dice, 612 P.2d 1203 (Kan. 1980), in which nonrenewal was upheld because "sufficient" evidence supported the decision. Sufficient evidence, the court said, varies according to the situation, "although it need be only enough to prevent the decision from being totally arbitrary and capricious." *Id.* at 1211.

[17] Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966), *cert. denied,* 385 U.S. 1003 (1967); Shatting v. Dillingham School Dist., 617 P.2d at 14; Dobervich v. Central Cass Pub. School Dist., 302 N.W.2d 745 (N.D. 1981).

[18] Fay v. Board, 298 N.W.2d 345 (Iowa Ct. App. 1980) (weak support for abuse of discretion).

The North Carolina statute provides that the board may refuse to renew the contract of any probationary teacher "for any cause it deems sufficient: Provided, however, that the cause may not be arbitrary, capricious, discriminatory or for personal or political reasons."[25] In the fourteen years since the North Carolina Teacher Tenure Act was enacted, there have been only six litigated teacher nonrenewals in which an attempt was made to apply the "arbitrary and capricious" standard contained in that law. Two of these suits involved the federal courts and a claim that the statute established rights protected by the federal Constitution. The federally based claim was clearly rejected in 1977, when the Fourth Circuit found in *Sigmon v. Poe*[26] that the statute establishes no "property" interest under the fourteenth amendment. (The fourteenth amendment due process clause applies only when the school is taking either a property or liberty interest of the plaintiff. The teacher had argued that the statute's prohibition against an arbitrary nonrenewal created a "property" right for the probationary teacher that required a due process hearing to show that the board's nonrenewal was not arbitrary.) In the other decisions that reach a conclusion on whether the cause of the nonrenewal was arbitrary, the courts have said that a board can refute such an allegation by showing any plausible educationally related basis for the decision. But if the board acted frivolously or whimsically or has sought to limit constitutionally protected speech, a statutory violation usually will be found.

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[19] Ala. Code § 16-24-2 (1977); Alaska Stat. § 14.20175(a) (1982). Alaska's statute, unlike Alabama's, also required the board to provide a written statement of the reasons and an "informal" board hearing if the teacher requests them. South Dakota also requires written notice of the reasons and a board hearing on the nonrenewal. S.D. Codified Laws Ann. § 13-46-10.2 (1982).

[20] Cal. Educ. Code § 44949(d) (1978). *See* Griggs v. Board of Trustees, 37 Cal. Rptr. 194 (Cal. Ct. App. 1964), for nonrenewal case that established the test that there must be a reasonable relationship between the cause for nonrenewal and the welfare of the Schools. *Id.* 194.

[21] Conn. Gen. Stat. Ann. § 10-15(a) (Supp. 1983).

[22] *See* Devlin v. Bennett, 213 A.2d 725 (1965), for a full discussion of the Connecticut statute.

[23] N.D. Cent. Code § 15-47-38(5) (Supp. 1983).

[24] *See, e.g.,* Donaldson v. Board of Educ., 320 A.2d 857, 859 (N.J. 1974) ("The board's determination not to grant tenure need not be grounded on unsatisfactory classroom or professional performance, for there are many unrelated but nonetheless equally valid reasons why a board, having had the benefits of observation during the probationary period, may conclude that tenure should not be granted"). *See also* Jinkerson v. Lane County School Dist., 531 P.2d 289 (Or. Ct. App. 1975) ("[I]t is apparent that [the good-faith requirement] is a very narrow limitation on a school district's exercise of professional judgment in personnel matters . . . ."); Dobervich v. Central Cass Pub. School Dist., 302 N.S.2d 745 (N.D. 1981) ("[T]he exercise of discretion [by the board] is not subject to review by the courts except in a case of clear or gross abuse of discretion, clear violation of law, fraud, bad faith or the transcending of the board's legal authority").

[25] N.C. Gen. Stat. § 115C-325(m)(2) (1983).

Oregon's teacher-renewal standard is similar to North Carolina's. It provides that the "board may, for any cause it may deem in good faith sufficient, refuse to renew the contract of any probationary teacher."[27] The Oregon Court of Appeals interpreted the provision in 1975, although it declined to define "good faith" precisely. It said that the good-faith requirement is a very narrow limitation on a school district's exercise of professional judgement in personnel matters and may mean only that a "nonrenewal cannot be based on a constitutionally impermissible reason."[28] The court also made clear that the burden is on the teacher to plead and prove that the decision not to renew was made in bad faith. It suggested that a bad faith decision might be defined as one that is tainted with fraud, malice, dishonesty, corruption, collusion, wrongful motive, or intentional wrongdoing.[29] It further noted that the fact that others would have decided differently on the same evidence does not establish bad faith. The board is responsible for making personnel decisions, and the court may not substitute its judgment if a reasonable basis exists for the board's decision.

To define the issue better, cases in which the board decision was found to be arbitrary and then cases in which the claim was rejected are reviewed below.

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[26] 564 F.2d 1093, 1096 (4th Cir. 1977. *Accord* Sutton v. Marianna School Dist., 573 F. Supp. 159 (E.D. Ark. 1983).

[27] Or. Rev. Stat. § 432.835(2) (1983) (emphasis added). The "good faith" requirement is essentially the equivalent of the arbitrary and capricious standard.

[28] Jinkerson v. Lane School Dist. 178, 531 P.2d 289, 292 (Or. Ct. App. 1975).

[29] *Id.* at 292.

Arbitrary Action Found

Courts have found nonrenewals to be arbitrary when the true reason is unjustified discrimination, personal bias, or prejudice. In Kentucky, the Supreme court held that it is arbitrary and discriminatory to refuse to re-employ a teacher because of his or her place of birth.[30] The school failed to show that people born in the county were more loyal to the school system than residents of other counties, and the nonrenewal was found to be both arbitrary and unconstitutional.[31] In California, the state court of appeals reinstated a probationary teacher saying that a school board's refusal to rehire her because she was overweight (5 feet, 7 inches and 228 pounds) was unrelated to her effectiveness as a teacher.[32] And the Tenth Circuit Court of Appeals, in *Stoddard v. School District No. 2*,[33] held that a school board may not base nonrenewal on a contrived reason. The denial was actually based, the court said, on the prejudices of a small, predominantly Mormon community in Wyoming; thus the decision not to renew demonstrated bad faith and also was unconstitutional. The court said that the real reasons for the teacher's nonrenewal were her obesity, her failure to attend church, the location of her trailer home, her card-playing, and rumors that she was having an affair, rather than the board's claimed reasons that she inadequately disciplined her students, kept an untidy classroom, and was generally an unsatisfactory teacher.

An arbitrary nonrenewal also was found in a case that involved an illegal attempt by school officials to circumvent the North Carolina Tenure Act's three-year limit on probationary status.[34] When a high school teacher and head coach came up for a tenure decision, the principal conditioned a recommendation for renewal on the teacher's signing a statement that his probationary period would be extended to a fourth year. The teacher refused to sign; and the principal and the superintendent recommended nonrenewal. When the board voted not to renew, the teacher sued, arguing that the board had been arbitrary and capricious in violation of the tenure statute. The trial court dismissed the action, and the teacher appealed.

The state appellate court reversed. It said that if the board's decision of nonrenewal was based solely on the two administrators' recommendation not to reappoint, then the board had not acted arbitrarily. But if the board's action had been based on the teacher's refusal to sign the statement — a statement intended to circumvent the tenure statute — then the board had acted arbitrarily. The court remanded the case to the trial court to determine on which basis the board's decision had been made.

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[30] Johnson v. Dixon, 501 S.W.2d 256 (Ky. 1973).

[31] *See also* Head v. Haywood County, No. A-C-75-69 (W.D.N.C. July 15, 1976) (new residents of county who had strongly criticized the superintendent were awarded $2,500 in damages by a jury that found sufficient evidence to support an allegation of an arbitrary nonrenewal).

[32] Blodgett v. Board, 97 Cal. Rptr. 406 (Cal. Ct. App. 1971).

[33] 590 F.2d 829 (10th Cir. 1979).

[34] 260 S.E.2d 135 (1979).

A North Carolina case, *Johnson v. Branch*,[35] illustrates the fact that even when the state statutes contain no prohibition against arbitrary nonrenewal, courts will reinstate teachers when the nonrenewal has no educationally related basis. The Fourth Circuit decided this case in 1966, before the specific statutory prohibition against arbitrary nonrenewal was enacted. The court held that a school board's action in not renewing a teacher's contract for various reasons characterized by the court as "minor" was "arbitrary and capricious" and therefore illegal.

The case arose in a rural eastern North Carolina community that had become a focal point of a voter registration drive in which the teacher, a black with twelve years of service in the school system, was active. Moreover, her husband and her father were both candidates for public office. The civil rights activity produced an emotionally charged situation, and in the spring of 1964, Mrs. Johnson was given a letter listing seven infractions of school rules by her. She later was notified that she would not be reappointed. None of the infractions pertained to the quality of her classroom work; they included such items as her being fifteen minutes late to supervise a night athletic contest, arriving late to school (although before classes began), not furnishing a written explanation for missing a PTA meeting, not standing in her class doorway to supervise class changes, and not keeping her cabinets neat. The teacher had been rated above average or excellent for all twelve years of her service, and her principal had recommended her for reappointment. The school board, however, chose not to renew her contract, purportedly for the reasons stated in the warning letter.

Johnson sued, alleging that the board had acted arbitrarily and capriciously in penalizing her for exercising constitutionally protected rights. The trial court dismissed the suit, but the Fourth Circuit reversed, holding that the minor infractions were neither individually nor collectively sufficient to justify failure to renew a teacher with an outstanding twelve-year record. It said:

> The statute gives discretion to the school board in deciding wheth-

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[35] 364 F.2d 177 (4th Cir. 1966).

> er or not to continue the employment of a teacher. Discretion means the exercise of judgment, not bias or capriciousness. Thus it must be based on fact and supported by reasoned analysis .... [T]he infractions enumerated in the March 10th letter were neither individually nor collectively such as to justify failure to renew the contract of a teacher with the plaintiff's record of twelve years .... [T]he action of the school board was arbitrary and capricious.[36]

Although no proof was advanced that the board's decision was retaliation for the civil rights activities of the teacher and her husband, the court noted that the decision had been made in "the highly charged emotional background of a small eastern North Carolina community in the throes of a civil rights campaign .... " Since the school's charges were so trivial, the court said, the only reasonable inference was that Mrs. Johnson's contract was not renewed because of her civil rights activity. It considered the two issues together (alleged arbitrary act and constitutional violation) and found that the board had been arbitrary and also had denied the teacher her constitutionally protected rights.

Thus a court may find a decision to be arbitrary if that decision is based on reasons unrelated to a teacher's competence, is trivial, is factually unsupported, or is unconstitutionally discriminatory.[37]

No Arbitrary Action Found

Courts have usually upheld nonrenewals, rejecting teachers' claims of arbitrary action. For example, they have upheld nonrenewal decisions challenged as being arbitrary when the board showed that the decisions were made because the teacher had not followed administrative regulations, was insubordinate, or had demonstrated unprofessional conduct. Examples of insubordination and unprofessional conduct include failure to maintain a "plan book" adequately despite repeated requests to do so,[38] failure to follow administrative regulations by not submitting an individual educational program on the date requested,[39] refusal to teach on a legal holiday that has been designated a school day,[40] and use of abusive language when dealing with students.[41]

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[36] *Id.* at 181-82.

[37] *But see* Reed v. Edgeley Pub. School Dist., 313 N.W.2d 775, 780, 1 Ed. Law 1285, 1290 (N.D. 1981), in which the North Dakota Supreme Court said: "We do not believe that testimony indicating that one member of the board desired to 'get rid of Reed' would be grounds for concluding that the Edgeley School Board acted arbitrarily." *See also* Fercho v. Montpelier Pub. School Dist., 312 N.W.2d 337, 341 (N.D. 1981).

[38] Jinkerson v. Lane County School Dist., 531 P.2d 289 (Or. Ct. App. 1975).

[39] Cervantez v. Morenci Pub. Schools, 605 P.2d 462 (Ariz. 1979).

[40] Skeim v. Independent School Dist., 234 N.W.2d 806 (Minn. 1975).

Nonrenewal has been held to be not arbitrary even when it is based on personality conflicts or poor working relationships with co-workers or superiors,[42] or when one member of the school board is out "to get rid" of a teacher.[43] Problems in dealing with students — such as lack of classroom control,[44] inconsistent handling of discipline,[45] inadequate supervision,[46] and lack of confidentiality when dealing with student records[47] — have been successful defenses against a teacher's allegation of arbitrary nonrenewal. A showing of poor classroom performance also refutes a claim of arbitrary nonrenewal. For example, teachers' claims of arbitrariness have been rejected when it was shown that their classroom instruction was disorganized;[48] or that students' performance and motivation were poor;[49] or that proper criticism, suggestions, or new teaching methods were rejected,[50] or that performance was unsatisfactory.[51] Finally, some courts have said that it is not arbitrary to not renew a probationary teacher whose performance is generally satisfactory when the board believes that it can find a better teacher.[52]

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[41] Shatting v. Dillingham School Dist., 617 P.2d 9 (Alaska 1980). *See also* Frison v. Franklin County Bd. of Educ., 596 F.2d 1192 (4th Cir. 1979) (demotion for reading to class a student note that contained three vulgar colloquialisms.) *But see* Lindros v. Governing Board, 510 P.2d 361 (Cal. 1973) (reading aloud a short story that contained a vulgarity failed to establish "cause" related to school welfare and therefore was not basis for nonrenewal).

[42] Jinkerson v. Lane County School Dist., 531 P.2d 289 (Or. Ct. App. 1975); California Fed'n of Teachers v. Oxnard Elementary Schools, 77 Cal. Rptr. 497 (Cal. 1969); Homan v. Blue Ridge School Dist., 405 A.2d 572 (Pa. Commw. 1979); Boyd v. Mary E. Dill School Dist. No. 51, 631 P.2d 577 (Ariz. 1981); Drown v. Portsmouth School Dist., 451 F.2d 1106 (1st Cir. 1971).

[43] Reed v. Edgeley Pub. School Dist., 313 N.W.2d 775, (N.D. 1981).

[44] Devlin v. Bennett, 213 A.2d 725 (Conn. 1965). *Accord* Kudasik v. Board, 455 A.2d 261 (Pa. 1983).

[45] *Id.*

[46] Shatting v. Dillingham School Dist., 617 P.2d 9 (Alaska 1980).

[47] Homan v. Blue Ridge School Dist., 405 A.2d 572 (Pa. Commw. Ct. 1979).

[48] Devlin v. Bennett, 213 A.2d 725 (Conn. 1965); Homan v. Blue Ridge School Dist., 405 A.2d 572 (Pa. Commw. Ct. 1979); Busker v. Board of Educ., 295 N.W.2d (S.D. 1980); Chappell v. Brunswick County Bd. of Educ., No. 82 CVS 293 (N.C. Super. Ct., 1983).

[49] Shatting v. Dillingham School Dist., 617 P.2d 9 (Alaska 1980); Dobervich v. Central Cass Pub. School Dist., 302 N.W.2d 745 (N.D. 1981).

[50] Boyd v. Mary E. Dill School Dist., 631 P.2d 577 (Ariz. 1981).

[51] Herr v. Adams-Arapahoe Joint School Dist., 503 P.2d 353 (Colo. Ct. App. 1972).

[52] *See, e.g.,* Branch v. School Dist., 432 F. Supp. 608 (D. Mont. 1977). In this case the teacher was apparently considered to be above average in teaching ability; but the court said that selecting teachers was a discretionary action and if the board felt that it could "get a better teacher to complement the system," it would not interfere with the board's judgment. *See also* Bridger Educ. Ass'n v. Board of Trustees, 678 P.2d 659 (Mont. 1984), in which the court interpreted the Montana statute that a teacher who is to be nonrenewed be furnished a written statement "of the reasons for termination of

The law on what constitutes an arbitrary and capricious nonrenewal is well stated in a 1972 Indiana case, *Tilton v. Southwest School Corporation*,[53] which involved the nonrenewal of an "average" teacher so that a better teacher might be sought. The court defined an arbitrary and capricious action as a "willfull and unreasonable action, without consideration and in disregard of the facts or circumstances of the case; action taken without some basis which would lead a reasonable and honest man to such action."[54] In this case, the board said that it did not renew the teacher's contract because "the instructional contribution made by [the teacher] to the educational program was not of a quality sufficiently high to merit [his] continuation as a teacher in the [school district] .... Further it was determined that the educational program in the social studies area could be improved by [the teacher's] replacement."[55]

The trial court held that the board's action was not "arbitrary and capricious," and the appeals court affirmed. The appeals court indicated that teacher evaluations would be considered in reviewing the decision, but as long as some basis existed that would lead a reasonable person to decide not to renew, the decision would not be found "arbitrary and capricious."[56] The court said that the substance of the reasons given, if true, was sufficient to support a decision to not renew; in this case, the principal's evaluations of the teacher supported those reasons. The court also pointed out that besides the interests of the teacher and the school, the interests of the school children involved had to be considered. The board is best equipped to decide what is in the children's best interests and how to achieve the district's educational goals.

Courts also have rejected claims of arbitrary nonrenewal when the school board has nonrenewed a teacher, actually hired as an assistant athletic coach, in order to give a new head coach a free hand in choosing his staff. A federal district court in Alabama upheld a nonrenewal after the school admitted this to be the reason for the nonrenewal.[57] The North Carolina Court of Appeals, however, recently reversed a trial court and ordered a teacher reinstated against this claim, although the board denied that it had acted arbitrarily

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employment." A divided court said that board notice that it could find a better teacher" was insufficient to meet the statutory requirements. Instead it must indicate those areas where the teacher's performance was less than it could expect from another teacher.

[53] 281 N.E.2d 117 (Ind. Ct. App. 1972).

[54] *Id.* at 122.

[55] *Id.* at 120.

[56] *Id.* at 122-23.

[57] 517 F. Supp. 686 (M.D. Ala. 1981).

saying that its sole reason for not renewing the appointment was that the school superintendent had recommended nonrenewal.[58]

Only about ten courts have dealt with the board's right to not renew an average teacher who has done nothing wrong, when that nonrenewal is for the purpose of seeking a better one. Except when subterfuge was involved, these courts have adopted the *Tilton* rationale: schools have a legal responsibility to put the best available teacher in the classroom; thus they do not act arbitrarily when they do not reappoint an "average" teacher so that they may meet that objective.

Conclusion

School boards' power to employ and reemploy teachers is given on the assumption that it will be used to hire and reappoint only the best teachers and administrators that the board can employ. For approximately a third of a school's probationary teachers, the decision to renew will confer permanent tenure. But whether tenure is at issue or not, few restraints are placed on the board's right to say that the employment ends with the current contract. For that decision to be arbitrary or capricious, an "abuse of board discretion" must exist. As the above cases demonstrate, this abuse exists when the decision is made for petty or fickle reasons that have no justifiable educational basis, or when the decision is unconstitutionally discriminatory. But when the school board has acted in good faith for reasons it thinks *probably* will improve the instructional programs — which includes not renewing an "average" teacher in order to look for a better teacher — its decision will generally stand.

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[58] No. 847SC91 (N.C. App. Ct. 1984).

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Recent Litigation Concerning Separation of Church and State

B. Glen Epley

The passions aroused by religious conviction are unequaled. Cognizant of centuries of strife between governments and their peoples over religion, the constitutional framers sought to divide church from state. In writing the first amendment, however, they created a new dilemma: how can government avoid promoting religion while allowing individuals to practice freely their religion?

A religious awakening in America has spawned a renewed interest in determining the proper height of the wall separating church from state. The public schools continue to be a principal battleground. From creation science to secular humanism, from the state's padlocking of a church to prevent its operating a school to a parent's suing because a reading series includes passages on tolerance, first amendment religion cases crowd our court dockets. The rulings reveal a judiciary uncertain where to strike a balance between the interests of the majority and the rights of the minority.

Public Aid to Private Schools

For many years and for many reasons, various states have tried to discover means for providing aid to students attending nonpublic schools. Often, the programs have succeeded, but, because most private schools have religious affiliations, any expenditure of state funds to nonpublic schools carries the risk of breaching the wall separating church and state. Few dilemmas in school litigation have the rich and varied history of state aid to private schools; the United States Supreme Court over the course of the last fifty years has heard no fewer than nineteen cases involving legislation of at least nine states and the federal government on issues as varied as the loan of textbooks to supplementing private school teachers' salaries.[1] Yet the cumulative criteria for striking a neutral balance remain unclear; two more cases are currently on the docket before the Court.[2]

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[1] *See,e.g.*, Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930); Everson v. Board of Educ., 330 U.S. 1 (1947); Board of Educ. of Cent. School Dist. No. 1 v. Allen, 392 U.S. 236 (1968); Walz v. Tax Commission, 397 U.S. 664 (1970); Lemon v. Kurtzman, 402 U.S. 602 (1971); Sanders v. Johnson, 403 U.S. 955 (1971); *aff'g*. 319 F. Supp. 421 (D. Conn. 1970); Tilton v. Richardson, 403 U.S. 672 (1971); Levitt v.

The story of past litigation is well-told; suffice it to say here that each new effort to aid nonpublic schools brings its own thorny problems which defy simple classification. Justice Black's struggle with the issue is illustrative: in 1947, he wrote for the 5-4 majority upholding New Jersey's bus fare reimbursement program;[3] twenty-one years later he called a New York law providing the loan of textbooks to private schools "a flat, flagrant, open violation of the First and Fourteenth Amendments."[4] Although often sharply-divided, the Court, in general terms, has upheld state aid to provide textbooks,[5] bus service,[6] certain auxillary services,[7] financial grants to higher education,[8] and state income tax deductions for private school tuition;[9] on the other hand, the Court has struck down laws which provide private schools with salary supplements for teachers,[10] certain forms of testing,[11] maintenance and repair for buildings,[12] direct tuition reimbursements and tax credits,[13] instructional equipment and materials,[14] and field trip transportation.[15] In related matters, the Court has allowed property tax exemptions for nonprofit religious enterprises[16] and has ruled that federal taxpayers have standing in court to challenge title I of the Elementary and Secondary Act

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Cathedral Academy, 409 U.S. 977 (1973); Hunt v. McNair, 413 U.S. 734 (1973); Committee for Public Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Sloan v. Lemon, 413 U.S. 825 (1973); Levitt v. Committee for Pub. Educ. and Religious Liberty, 413 U.S. 472 (1973); Public Funds for Pub. Schools v. Marburger, 417 U.S. 961 (1974), *aff'g*. 358 F. Supp. 29 (D.N.J.1973); Wheeler v. Barrera, 417 U.S. 402 (1974); Meek v. Pittenger, 421 U.S. 350 (1975); Roemer v. Board of Pub. Works, 426 U.S. 736 (1976); Wolman v. Walter, 433 U.S. 229 (1977); Committee for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646 (1980); Mueller v. Allen, 103 S. Ct. 3062 (1983).

[2] Felton v. Secretary, United States Dep't of Educ., No. 84-238 (scheduled for oral argument Dec. 5, 1984). Ruling below, 739 F.2d 48 (2nd Cir. 1984); School Dist. of Grand Rapids v. Ball, No. 83-990 (scheduled for oral argument Dec. 5, 1984). Ruling below *sub. nom.* of Grand Rapids, 718 F.2d 1389 (6th Cir. 1983).

[3] Everson, 330 U.S. 1.

[4] Allen, 392 U.S. at 250.

[5] *Id.* Cochran, 281 U.S. 370; Meek, 421 U.S. 350.

[6] Everson, 330 U.S. 1.

[7] Wolman, 433 U.S. 229.

[8] Tilton, 403 U.S. 672; Hunt, 413 U.S. 734; Roemer, 426 U.S. 736.

[9] Mueller, 103 S. Ct. 3062.

[10] Lemon, 403 U.S. 602; Sanders, 403 U.S. 955.

[11] Levitt, 409 U.S. 977; Sanders, 403 U.S. 955; Regan, 444 U.S. 646; Marburger, 417 U.S. 961.

[12] Nyquist, 413 U.S. 756.

[13] *Id.* Sloan, 413 U.S. 825.

[14] Meek, 421 U.S. 350; Wolman, 433 U.S. 229.

[15] Wolman, 433 U.S. 229.

[16] Walz, 397 U.S. 664.

of 1965.[17]

Any synthesis of the reasoning for the above decisions is fraught with danger and qualifications, but the oft-quoted words of Chief Justice Burger elucidate the clearest test available: "First, the statute must have a secular legislative purpose; second, the principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster an excessive government entanglement with religion."[18]The gravamens in the cases currently before the United States Supreme Court turn on this three-pronged test.

In *Felton v. Secretary, United States Department of Education,*[19] federal taxpayers seek to halt the sending of public school teachers into parochial schools to provide remedial education required by federal law.[20] Since 1966, New York City officials have found the most efficient means of providing title I services for private school students is to send public school teachers directly to the private school campus. No claim was made that any of the public school teachers so engaged attempted to use their positions to proselyte their faith; the appellate court wrote:

> We have no doubt that the program here under scrutiny has done much good and that, apart from the Establishment Clause, the City could reasonably have regarded it as the most effective way to carry out the purposes of the (ESEA) Act. We likewise have no doubt that the City has made sincere and largely successful efforts to prevent the public school teachers and other professionals whom it sends into religious schools from giving sectarian instruction or otherwise fostering religion.[21]

However, the court believed that the first amendment's ban on state establishment of religion prohibits the use of federal funds to provide public school teachers in private schools. Such use, the court believed, inexorably involved entanglement between church and state.

Noting that its role "in a field that has been so thoroughly ploughed by the Supreme Court . . . is not to make an independent interpretation of the constitutional text or to engage in creative distinctions but to do its best to follow what the Court has said,"[22] the Second Circuit laboriously reviewed salient precedent, giving particular attention to ***Meek v. Pittenger.*** It read ***Meek*** as being decided largely on the ground of unacceptable entanglement, not aid to religion.[23] In the end, the court found that "unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment."[24] Ensuring that the public school teachers working on the private school campuses did not exceed the bounds of the first amendment would involve excessive and enduring entanglement.[25]

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[17] Flast v. Cohen, 392 U.S. 83, (1968).

[18] Lemon, at 612-13.

[19] Felton, 739 F.2d 48.

[20] Title I of the Elementary and Secondary Act of 1965 (now Chapter One of the Education Consolidation and Improvement Act of 1981) requires equal funding for private school students qualifying for remedial education. 20 U.S.C. § 2740(a). Departmental regulations call for services for private school students to be comparable to that provided public school children. 45 C.F.R. § 116a.23.

[21] Felton, 739 F.2d at 49.

The entire tone of the dicta is sympathetic to New York's program: "This is a hard case, and hard cases . . . can make bad law. We fully understand and appreciate . . . why . . . the district judge here struggled to find constitutional justification for a program that apparently has done so much good and little, if any, detectable harm."[26] But recalling its obligation to follow settled law, the court concluded, "We cannot escape the conviction that, despite the attempted distinctions, appellees are really asking us to say that ***Meek*** was wrongly decided . . . . Whatever the merits of that argument may or may not be, we are nevertheless bound by the ***Meek*** decision."[27] The Supreme Court, of course, is not so bound and has consented to hear the argument.

Muddying the water of the ***Felton*** appeal is the Michigan case, ***School District of City of Grand Rapids v. Ball,*** which has been combined, upon the urging of the Justice Department, with ***Felton.***[28] At issue in ***Ball*** are local programs, financed with local and state taxes, which provide public school instruction on private school campuses. The courses are taught by instructors under the hire of the public school in classrooms leased from the private schools. Many of the teachers of the courses are or were regular, full-time employees of the private school from which space is leased. The programs in operation since 1976, grew four-fold in three years. The specific courses available in the elementary schools would not otherwise be available in the nonpublic schools; in the secondary schools, one physical education course required for graduation is offered only through the challenged program.

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[22] *Id.* at 54.
[23] *Id.* at 72.
[24] *Id.* at 55, *quoting Meek*, 421 U.S. at 619.
[25] *Id.* at 64.
[26] *Id.* at 71-72.
[27] *Id.* at 72.
[28] School Dist. of Grand Rapids, 718 F.2d 1389.

The Court of Appeals for the Sixth Circuit ruled that the programs bestowed significant financial benefits upon a narrow class of religious schools.[29] Indeed, the court believed that "the Public School District is gradually, but surely, taking over an integral function of these religious schools; namely, providing an education to parochial students."[30] In addition to having a primary effect of advancing religion, the programs presented insolvable entanglement issues. First, the programs caused the school board, in an effort to pass a local millage act, to foster political division along religious lines by touting the benefits of the challenged programs to private school parents.[31] Second, the court believed that the potential for the individual teachers to advance religious doctrine under the programs' conditions could not be ignored.[32]

Far from feeling the tugging emotions experienced by the *Felton* court, Chief Judge Edwards wrote for the majority:

> We recognize, of course, the increasing impact of Supreme Court majority approval of public funding for religiously neutral supplies and services which are provided to all schools, including parochial schools. If, however, what has been adopted by the Grand Rapids School Board were added to the list of such approvals, *the separation of church and state will be effectively ended in the field of public education.*[33]

Circuit Judge Krupansky dissented. He believed that a logical extension of *Allen, Meek,* and *Wolman* is that "oral secular instruction so long as such instruction is, *in fact and practice,* confined to secular ideologies and does not have the primary effect of advancing religion"[34] is acceptable. Judge Krupansky complained that no record, or even allegation, existed that the teachers proselyted their faith while on the public payroll; rather, he claimed, the majority relied solely on the possibility that such advancement of religion could occur.[35]

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[29] *Id.* at 1399.
[30] *Id.* at 1403.
[31] *Id.* at 1400.
[32] *Id.* at 1399.
[33] *Id.* at 1406 (Emphasis added).
[34] *Id.* at 1412-13 (Emphasis in original).
[35] *Id.* at 1408.

On December 5, 1984, the U.S. Supreme Court heard oral arguments on the cases. The recent ruling in *Mueller v. Allen*[36] gives indication that the Court, despite Judge Edwards fears, might take a more accommodating view of state aid to private schools. *Felton* and *Ball* will show whether *Mueller* was the beginning of a new trend of high court benevolence toward state aid to parochial schools. Of particular interest will be the alignment of the majority considering the age of five of the Justices and the Reagan Administration's support for increased aid to private schools.

In a slightly different twist to state aid to private schools, the plaintiffs in *McCarthy v. Hornbeck* claimed that if Maryland did not provide free transportation for private school children, it would violate the free exercise clause.[37] The United States district court countered that "a statute does not impinge on a constitutional right merely because it does not subsidize"[38] the free exercise of religion. The court did not require Maryland to transport private school children at public expense.

The recent cases illustrate why the courts have had such great difficulty defining with precision the wall separating church from state in private school aid. Whenever children benefit from the aid, the program advances the state interest in educating children. But any financial grant to parochial schools or the parents who send their children to such schools cannot help but benefit the religion as well. Given the sharply divergent views as to where to strike the balance between the child's benefit and the religious benefit, and the varying degrees of entanglement caused by any aid, the recent cases are helpful as guideposts to current trends but certainly not a lasting settlement to aid for nonpublic schools.

Prayer and Bible Reading in the Public Schools

The proper role of prayer in public life, especially in public school classrooms, has become a perennial issue.[39] Supreme Court precedent leaves little doubt that the state and its creations are prohibited from authorizing, composing, or encouraging prayer in public schools,[40] but a number of efforts are underway to bypass the Court's constitutional interpretation. President Reagan has established as one of his major goals the passage of a constitutional amendment allowing voluntary prayer in public schools,[41] and several bills have been introduced in Congress which would prohibit the federal judiciary from hearing challenges to voluntary school prayer and Bible reading.[42]

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[36] Mueller, 103 S. Ct. 3062.

[37] McCarthy v. Hornbeck, 590 F. Supp. 936 (D. Md. 1984).

[38] *Id.* at 945. *See also,* d'Errico v. Lesmeister, 570 F. Supp. 158 (D.N.D. 1983); Elbe v. Yanktown Indep. School Dist. No. 1, 714 F.2d 848 (8th Cir. 1983).

[39] *See* G. Sorenson, ***Shall We Pray? The Latest Word from Legislatures and Courts***, School Law Update . . . Preventive School Law (Jones & Semler 1984) at 58-68.

[40] *See, e.g.,* Engel v. Vitale, 370 U.S. 421 (1962); and School Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963).

In 1985, the Supreme Court will have the opportunity to review its stance on public school prayer in *Wallace v. Jaffree.*[43] Three issues are at stake: 1) may teachers, absent motivating state statute or board policy, lead voluntary prayer in the classroom; 2) may the state authorize a prayer to be recited by willing students; and 3) are moments of silent meditation constitutionally permissible?

Certain Mobile County, Alabama, school teachers had led their students in the recitation of the Lord's Prayer and three common blessings.[44] The state claimed that such prayers were "without state action or participation and not pursuant to any policy or statute authorizing or encouraging such activities."[45] In addition, they claimed that the "Supreme Court has misread history regarding the first amendment and has erred by holding that the first amendment is made applicable to the states through the fourteenth amendment."[46] The United States District Court for the Southern District of Alabama agreed that the Supreme Court misinterpreted the Constitution and dismissed the complaint against the teachers' actions.[47] The court noted that such a conclusion may "be no more than a voice crying in the wilderness and this attempt to right that which this court is persuaded is a misreading of history (perhaps) will come to nothing more than blowing in the hurricane."[48] Because the district court believed that the first amendment does not prohibit the state establishment of religion, it did not rule on the remaining two issues.[49]

The Eleventh Circuit took a different view. Although quick to point out that its role was not to decide whether or not prayer in public schools is a desirable policy, the circuit court did not believe that lower federal courts could ignore *stare decisis* in a matter so thoroughly analyzed by the Supreme Court.[50] The circuit court found teachers to be agents of the state and "If a statute authorizing the teachers' activities would be unconstitutional, then the activities, in the absence of a statute, are also unconstitutional."[51]

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[41] Ronald Reagan, *The State of the Union Address,* delivered before a joint session of the Congress (January 25, 1983).

[42] *See* Sorenson, *supra* note 39, at 58-62.

[43] Wallace, 705 F.2d 1526 (11th Cir. 1983), *cert. granted* (1984) (No. 83-812).

[44] The blessings were 1) God is great, God is good, Let us thank him for our food, bow our heads we all are fed, Give us Lord our daily bread. Amen. 2) God is great, God is good Let us thank Him for our food. 3) For health and strength and daily food we praise Thy name, oh Lord.

[45] *Id.* 705 F.2d 1526 at 1529 (11th Cir. 1983).

[46] *Id.*

[47] Jaffree v. Board of School Comm'rs of Mobile County, 554 F. Supp. 1104 (S.D. Ala. 1983).

[48] *Id.* at 1128.

[49] Jaffree v. James, 544 F. Supp. 1130 (S.D. Ala. 1983). Justice Powell issued a stay of the district court's order less than a month later. *Id.* 103 S. Ct. 842 (1983).

The court found the state-composed prayer to be a quintessential religious practice which could satisfy no secular purpose.[52] "The primary effect of prayer is the advancement of ones (sic) religious beliefs,"[53] and, as a result, composing a prayer acknowledging the existence of a supreme being involves the state in advancing religion. "The fact that the prayer is voluntary and non-denominational does not neutralize the state's involvement. The state must remain neutral not only between competing religious sects, but also between believers and non-believers."[54]

With regard to meditation, both the district court[55] and the circuit court[56] found the intent of the statute to return prayer to the public schools and the statute's primary effect to advance religion. The circuit court wrote:

> We do not imply that simple meditation or silence is barred from public schools; we hold that the state cannot participate in the advancement of religious activities through any guise, including teacher-led meditation. It is not the activity itself that concerns us; it is the purpose of the activity that we shall scrutinize.[57]

In the appeal to the Supreme Court, the Reagan administration has filed in behalf of Alabama. In its *amicus* brief, the Justice Department called silent meditation "a legitimate way for government to provide an opportunity for both religious and nonreligious introspection in a setting where, experience has shown, many desire it. It is an instrument of toleration and pluralism, not of coercion or indoctrination."[58] Oral arguments were heard December 4, 1984.

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[50] Wallace, 705 F.2d at 1532.

[51] *Id.* at 1534.

[52] Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sanctity of our homes and in the classrooms of our schools. In the name of our Lord. Amen. Ala. Code § 16-1-20.2

[53] *Id.* at 1534-35.

[54] *Id.* at 1535.

[55] Jaffree v. James, 544 F. Supp. 727 at 731 (S.D. Ala. 1982) (preliminary injunction).

[56] Wallace, 705 F.2d at 1535.

[57] *Id.* at 1535-36.

Given the history of Supreme Court decisions striking prayer from the classroom and the uniformity of lower federal courts in striking silent meditation laws,[59] any form of reversal in *Jaffree* by the Supreme Court would mark the dawn of a dramatically different day in church-state relationships. Silent meditation, though, is before the Court for the first time. A rider providing for silent meditation in the schools passed the House in the summer of 1984 before dying in conference.[60] Similar and stronger measures are sure to resurface if the Court upholds *Jaffree*, and the Supreme Court may find silent meditation an innocuous compromise. If such is the case, the words of Chief Justice Burger bear special significance:

> We [cannot] fail to see that in constitutional adjudication some steps, which when taken were thought to approach "the verge" [of constitutional violation], have become the platform for yet further steps. A certain momentum develops in constitutional theory and it can be a "downhill thrust" easily set in motion but difficult to retard or stop . . . As well as constituting an independent evil against which the Religion Clauses were intended to protect, involvement or entanglement between government and religion serves as a warning signal.[61]

Three additional recent prayer and Bible cases merit note. In *May v. Cooperman*,[62] a New Jersey statute which permitted students "to observe a 1 minute period of silence to be used solely at the discretion of the individual student,"[63] was struck down. The district court for New Jersey held that the law had no bona fide secular purpose, advanced the religion of some and inhibited the religion of others, and entangled the government in divisiveness among and between religious groups. Despite this ruling, the board of education of the city of Woodbury continued its twenty-two year policy of starting each school day with a moment of silence. The New Jersey appellate court judge, noting that *May v. Cooperman* was on appeal to the Third Circuit and the pending case of *Wallace v. Jaffree* before the

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[58] Education Week, Sept. 26, 1984, at 1, col. 4, 5.

[59] *See, e.g.*, Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981); Duffy v. Las Cruces Pub. Schools, 557 F. Supp. 1031 (D.N.M. 1983); May v. Cooperman, 527 F. Supp. 1561 (D.N.J. 1983); Beck v. McElrath, 548 F. Supp. 1161 (M.D. Tenn. 1982).

[60] H.R. 11, 98th Cong. 2nd Sess. (1984).

[61] Lemon, 403 U.S. at 624-25.

[62] May, 527 F. Supp. 1561.

[63] New Jersey Pub. L. 1982, ch. 205 (1) (passed over Governor's veto).

Supreme Court, refused to issue an injunction to stop the practice.[64]

Another long standing tradition was at issue in *Crockett v. Sorenson.*[65] For over forty years, the Bristol, Virginia public school system had provided instruction to fourth and fifth graders in the Bible. The classes were voluntary and carried no academic credit. The teachers of the classes were neither hired nor supervised by the public schools, but were provided by a private sponsoring group. The court held that "The First Amendment was never intended to insulate our public institutions from any mention of God, the Bible or religion. When such insulation occurs, another religion, such as secular humanisn, is effectively established."[66] The court concluded that the objective teaching of the Bible passes constitutional muster, but the Bristol program failed primarily in that it was sponsored and taught by an agency not controlled by the state.[67]

The proper role of prayer and Bible reading in public schools continues to be an extraordinarily sensitive component of constitutional law. As Justice Brennan has observed, "the line which separates the secular from the sectarian in American life is elusive. The difficulty of defining the boundary with precision inheres in a paradox central to our scheme of liberty."[68] The religious diversity and the remarkable sense of duty to individual principle embodied by our nation's people will keep our courts in continual search, as was Diogenes, for the truth separating governmental encouragement, neutrality, and hostility vis-a-vis religion.

Student Religious Meetings in Public School Facilities

On frequent occasions school students wish to meet on school property to discuss or practice their religious faiths under the protection of the free exercise clause of the first amendment. School officials, however, note that such use of schools may violate the establishment clause of the first amendment. Over the past three years, a number of court cases and one piece of federal legislation have tried, with limited success, to define the balance between the two conflicting provisions of the first amendment.

In late 1981, The U.S. Supreme Court upheld the right of university students to use public facilities for religious practice if the same facilities were provided to other university groups.[69] Six days later, it refused to grant certiorari to an appeal of a Second Circuit decision which upheld a public school's refusal to allow a student religious group to meet on campus.[70] The Third, Fifth, and Eleventh Circuits have since recorded decisions consistent with the Second Circuit,[71] but the District Court for the Northern District of Illinois supports such access.[72]

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[64] May, 527 F. Supp. 1561.

[65] Crockett v. Sorenson, 568 F. Supp. 1422 (W.D. Va. 1983).

[66] *Id.* at 1425.

[67] *Id.* at 1431. District Judge Kiser proceeded to outline a personal set of guidelines by which he believed Bible could be objectively taught.

[68] Schempp, 374 U.S. at 231 (Brennan, J., concurring.)

A final loop in the knot, The Equal Access Act,[73] effective in August 1984, makes it unlawful for public secondary schools to deny access to their facilities to student religious groups if the school allows other groups to meet on campus. In each of the four circuit court decisions, the gravamens concerned the impermissible entanglement of church and state; additional litigation will prove if contrary federal legislation will assuage the courts' fear that student worship on campus violates constitutional safeguards.

In the widely-discussed *Widmar v. Vincent*,[74] the Supreme Court believed that denying a religious group the opportunity to use an open public forum established by a university constitutes regulation of religious content speech.[75] Absent a compelling state interest, the university was thus in violation of the students' free speech and free exercise rights. The Court held that allowing students the opportunity to meet and discuss religious ideas would benefit religion only incidentally.[76] While noting that the university has a compelling interest to separate church from state, the Court maintained, "it does not follow, however, that an 'equal access' policy would be incompatible with this Court's Establishment Clause cases."[77]

It is important to note the final paragraph of the majority opinion:

> The basis for our decision is narrow. Having created a forum generally open to student groups, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech

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[69] Widmar v. Vincent, 454 U.S. 263 (1981).

[70] Brandon v. Board of Educ. of Guilderland School Dist. 635 F.2d 971 (2nd Cir. 1980); *cert. denied*, 454 U.S. 1123 (1981).

[71] *See* Bender v. Williamsport Area School Dist., 741 F.2d 538 (3rd Cir. 1984); Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 736 F.2d 646 (11th Cir. 1984).

[72] Clergy and Laity Concerned v. Chicago Board of Educ., 586 F. Supp. 1408 (N.D. Ill. 1984).

[73] Pub. L. 98-377 (title VIII).

[74] Widmar, 454 U.S. 263.

[75] *Id.* at 276.

[76] *Id.* at 273.

[77] *Id.* at 271.

> should be content-neutral, and the University is unable to justify this violation under applicable constitutional standards.[78]

Given this record, one may only speculate as to why the Court allowed to stand the *Brandon v. Board of Education of Guilderland School District* decision.[79] Here, the group "Students for Voluntary Prayer," was denied permission to meet in an unused classroom before the start of each school day, although other student groups were able to meet in such fashion. The Second Circuit opined that religion would be unconstitutionally advanced if the group were allowed to meet.

Perhaps the best argument to distinguish between the cases is that public school students are more impressionable than are young adults in college:

> Our nation's elementary and secondary schools play a unique role in transmitting basic and fundamental values to our youth. To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit.[80]

A Fifth Circuit decision takes the argument a step further. In *Guilderland,* the Eighth Circuit upheld the right of the school district not to allow student religious groups to meet; in *Lubbock Civil Liberties Union v. Lubbock Independent School District,*[81] the Fifth Circuit forbids school districts from allowing such groups to meet.

At primary issue in *Lubbock* was a school board rule which "permits students to gather at the school with supervision either before or after regular hours on the same basis as other groups as determined by the school administration to meet for any educational, moral, religious, or ethical purposes so long as attendance at such meetings is voluntary."[82] The court found this rule to have as its primary purpose the allowing of religious group meetings, to have a primary effect of advancing religion, and to entangle impermissibly the state in supervising religious activity.[83]

Lubbock cannot be considered a straightforward ban on religious access to school facilities, however. The court was influenced by the long history of the school district in promoting religion through morning Bible readings over the school public address systems, classroom prayers led by teachers, a period of silent prayer ended by "amen" over the public address systems, and distribution of Gideon Bibles to elementary school students. Such practices continued at least until 1979, and the court believed that the offending school policy struck in the decision was intended to maintain under another guise the traditional religious practices.[84] Legislation passed without the same historical baggage may have been considered differently.

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[78] *Id.* at 277.
[79] Brandon, 454 U.S. 1123.
[80] *Id.* at 978 (citations omitted) *See also* Widmar, at 274.
[81] Lubbock, 669 F.2d 1038.
[82] *Id.* at 1041.
[83] *Id.* at 1048.

Slightly different circumstances guided the Third Circuit in its 1984 decision, *Bender v. Williamsport Area School District.*[85] The school district had established an activity period during regular school hours to promote intellectual, physical or social development of students. The only student-organized group denied permission to meet during this period was a non-denominational prayer fellowship called Petros. Noting that public high school students do not possess the same intellectual maturity as college students and the limited nature of public schools as open forums, the court held that, although the students had protected free speech rights, the obligation of the school district to avoid the establishment of religion overrode the students' interest.[86]

The court concluded that allowing the students to meet as a religious organization had a valid secular purpose,[87] but permitting Petros to meet would unconstitutionally advance religion and require undue entanglement in the supervision of the activity.[88] Of primary concern to the court was the role teachers would be forced to play in supervising the activity. However, the court, clearly limited its decision to the particular circumstances present at Williamsport Area High School.[89]

The Eleventh Circuit was presented a similar case in 1984 when a Georgia school system allowed a Youth for Christ club to meet on school premises under faculty supervision and announced church sponsored activities over the schools' public address systems and bulletin boards.[90] The district court had granted a preliminary injunction in favor of the plaintiffs, and the school system appealed.

The Eleventh Circuit concluded that a policy of announcing church-sponsored activities may be violative of the entanglement prong of the establishment test. The court also upheld the district court's injunction against the use of school facilities for religious meetings by students, but it encouraged the district court to consider such factors as the extent of faculty sponsorship, the school's policy in relation to other groups desiring space for meetings, and the impression left on the students of allowing religious groups to meet.[91]

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[84] *Id.* at 1045.
[85] Bender, 741 F.2d 538.
[86] *Id.* at 561.
[87] *Id.* at 551.
[88] *Id.* at 555, 557.
[89] *Id.* at 561.
[90] Nartowicz, 736 F.2d. 646.

While the four circuit courts appear in relative agreement over religious access to public schools, the District Court for the Northern Districts of Illinois came to different conclusions.[92] Antiwar activists, including some associated with religious organizations, sought to have access to students equal to that of military recruiters. In part, the Chicago schools prohibited equal access for the antiwar activists in fear that such access would constitute an establishment of religion. The court held that "a policy of allowing religious groups access to a public forum equal to that allowed secular groups would not violate the establishment clause ... [T]he First Amendment demands neutrality of treatment between religious and non-religious groups."[93] Additionally, the court considered the allowing of military recruiters on campus to ceate an open forum which could not be regulated on the basis of speech content.[94]

In the summer of 1984, Congress entered the fray. Passing both Houses with overwhelming majorities, the Equal Access Act forces public secondary schools which receive federal financial assistance and which provide limited open forums for non-curriculum related groups to allow voluntary student-initiated groups equal access to the schools' facilities. The meetings must not interfere with the normal conduct of the school, and they may not be sponsored by the school or an outside group, although teachers may be present as nonparticipants. An earlier provision which would allow the Department of Education to withhold federal funds for noncompliance was not included in the adopted Act.[95]

Will the Act pass constitutional muster in light of the four circuit court opinions disallowing religious meetings on campus? As mentioned, each of the cases presented special circumstances not present in the congressional legislation. If the Act founders, it will be on entanglement problems. The Supreme Court and the various circuit courts have recognized that high school students must be shielded from any impression of state imprimatur on a particular religion. How school officials can supervise religious activities as nonparticipants and at the same time remain strictly neutral involves a juggling act beyond their powers.

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[91] *Id.* at 649.
[92] Clergy and Laity Concerned, 586 F. Supp. 1408.
[93] *Id.* at 1412.
[94] *Id.* at 1411.
[95] H.R. 2732, 98th Cong., 1st Sess. (1983).

Regulation of Parochial Schools

In 1925, the U.S. Supreme Court established the right of private schools to operate,[96] and no recent litigation has challenged that right. However, as the attraction of private sectarian education grows, particularly for fundamentalist Christians, new litigation seeks to define the right of a state to regulate private schools.

In late December 1983, the United States District Court for Maine granted private schools the right to operate without state regulation.[97] Maine had required a modest program for approval of private schools. An association of private sectarian schools objected to the state's program as an unwarranted intrusion into the lives of private individuals and institutions. The state sought to enforce its approval program by charging the parents of students in unapproved schools with truancy. It also threatened prosecution against church leaders who preached that education is a religious duty on the grounds that they were inducing habitual truancy.

The district court found that Maine provided no statutory authority for prosecuting as truants those students who attended unapproved schools. The court decided that religious worship and discussion were integral aspects of the private schools' curriculum which deserved full first amendment protection.[98] Should the state decide to close a pervasively sectarian school, it would do so at great risk of violating the free exercise clause of the first amendment.[99] With regard to promoting habitual truancy from the pulpit, the court ruled such prosecution would raise fundamental constitutional concerns.[100]

A Michigan court of appeals ruled differently.[101] A Michigan church-related school sought to excise state laws which mandated certain courses and curricular standards and for private school teachers to be certified by the state. The plaintiffs believed that "any attempt by the state to control or license their education 'ministry' is an infringement on their religious liberty."[102]

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[96] Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[97] Bangor Baptist Church v. State of Maine, Department of Educ. and Cultural Servs., 576 F. Supp. 1299 (D. Me. 1983).

[98] *Id.* at 1326.

[99] *Id.* at 1327.

[100] *Id.* at 1334.

[101] Sheridan Road Baptist Church v. Department of Education, 348 N.W.2d 263 (Mich. Ct. App. 1984).

[102] *Id.* at 268.

The state court found the objections of the private schools to be firmly based on religious doctrine, and if the state were to interfere with religious practice, it must have an "overriding interest of the highest order."[103] The court determined, however, that the compelling state interest in providing a proper education for all its children was sufficient to justify a reasonable program of regulation over private schools and did not entail an unnecessary entanglement between church and state.

The Supreme Court may side with the Michigan view that reasonable regulation of private schools is not constitutionally suspect. In late November 1984, it refused to review a Nebraska Supreme Court decision which found in contempt an unapproved private school which continued to operate despite court order.[104] The state supreme court had ruled in 1981 in *State v. Faith Baptist Church* that the critical interest of the state in the education of its children allowed intrusion into the free exercise of religion.[105] The Supreme Court would not hear an appeal from *Faith* for want of a substantial federal question.[106]

Certain limits do exist. In the continuing drama of Faith Baptist Church, the state trial court, after finding that the private school continued to operate in violation of the injunction against it, ordered the sheriff to padlock the church and school building except at times when the building was used for church services. In enforcing the order, the sheriff and fifteen carloads of deputies carried from the church approximately eighty-five persons who were conducting a protest prayer vigil. The protesters filed suit in federal district court claiming damages against the state and its officials for violating their right to the free exercise of religion. The district court ruled for the defendants, but the Eighth Circuit reversed.[107] It left intact the state's right to regulate private schools but believed the sheriff went too far in removing the church members from the building: "We assume that the state's interest in preventing the operation of the unapproved church school is a compelling one. That interest does not in any event justify hauling worshippers out of an ongoing church service."[108]

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[103] *Id.* at 270. (citations omitted)

[104] North Platte Baptist Church v. Nebraska, 345 N.W.2d 19 (Feb. 1981); *cert. denied* 53 U.S.L.W. 3365 (U.S. Nov. 13, 1984) (No. 83-1974). Nebraska has since modified its rules governing private schools, and the subject school is now operating legally.

[105] State v. Faith Baptist Church, 301 N.W.2d 571 (1981).

[106] *Id.* 454 U.S. 803 (1981).

[107] McCurry v. Tesch, 738 F.2d 271 (8th Cir. 1984).

[108] *Id.* at 275.

Another form of regulation is zoning. Two recent cases have upheld the right of local government to prohibit private schools from operating in violation of zoning ordinances.

The Arkansas Supreme Court found that the operation of a private church school constituted a religious action rather than a religious belief.[109] Infringement upon religious beliefs is absolutely prohibited, the court found, but the state has the right to protect the public welfare with reasonable laws governing religious action.[110] Because the church school had not applied for a conditional use permit, it was enjoined from operating. The court further noted that a permit to operate a church does not automatically authorize the church to open its own school.[111]

A similar case in Virginia was appealed to the Supreme Court after the two lower federal courts found in favor of the city's right to govern property use. The Supreme Court refused to hear the case.[112]

Still another form of regulation relates to labor disputes, and two recent decisions conflict. A United States district court in New York found that if the state labor relations board entered a dispute between lay teachers and parochial schools, it risked entangling government with religion,[113] while a United States district court in Virginia found that minimum wage enforcement against a parochial school does not violate the first amendment.[114]

In *Catholic High School Association of New York v. Culvert,* the Lay Faculty Association filed unfair labor practice complaints against a parochial school association. The court reasoned that allowing the State Labor Relations Board jurisdiction in the case would threaten the inclusion of religious subjects in the collective bargaining process. The result would require a state agency to moderate religious disagreements, and the court could not abide such an arrangement.

In *Donovan v. Shenandoah Baptist Church,* the church school claimed that it was governed by the word of God and that submitting its internal affairs to regulation by government would violate its religious principles. At primary issue was the entanglement of church-state affairs if government were allowed to regulate the parochial school's salary structure. The court found that no significant disruptions of the parochial school's religious or educational activities would result from enforcement of the Minimum Wage Act, nor would it infringe upon free exercise rights when the minimum wage itself is not repugnant to the school's religious tenets.[116]

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[109] Abram v. City of Fayetteville, S.W.2d 371 (1983).

[110] *Id.* at 372.

[111] *Id.*

[112] First Assembly Church of God v. City of Alexandria, Va., *cert. denied* (1984) (No. 84-445).

[113] Catholic High School Ass'n of New York v. Culvert, 573 F. Supp. 1550 (S.D.N.Y. 1983).

[114] Donovan v. Shenandoah Baptist Church, 573 F. Supp. 320 (W.D. Va. 1983).

[115] Culvert, 573 F. Supp. at 1557.

Some parents, for religious reasons, choose not to send their children to any form of school and cite as precedent *Wisconsin v. Yoder.*[117] In *Yoder,* the Supreme Court found that the Amish, a group with distinct religious beliefs and practices buttressed by 300 years of tradition, were entitled to exception from the state's compulsory education laws.

In North Carolina, a father held his two school-age children out of school because of religious and "sociopsychological" objections to public schools.[118] The appellate court held that the "State of North Carolina has a compelling interest in providing access to education for all . . . The State has no means by which to insure that children who are at home are receiving an education. Therefore, the State's interest in compulsory education outweighs plaintiff's interest in educating his children at home because of religious and sociopsychological beliefs."[119]

Similar logic controlled an Arkansas Supreme Court decision.[120] In not sending his child to any school, the father alleged, *inter alia,* that compulsory education violated his free exercise of religion. In distinguishing the case from *Yoder,* the court found the father unable to show that sending his child to some form of school would interfere with religious or cultural traditions comparable to those of the Amish.[121] In a concurring opinion, Justice Purtle noted that "No member of this court is of the opinion that a parent does not have the right to give his child a religious education at home."[122] However, this right did not extend to keeping the child out of any kind of school whatsoever.

Home instruction and private parochial schools which balk at any governmental regulation are proliferating, and many state officials are concerned about the quality of education children are receiving in such settings. To date, only the United States District Court of Maine has limited the state's right to reasonable control over nonpublic education. Overwhelming judicial tradition recognizes the compelling state interest in ensuring a high-quality education for all of its children, but equally impressive precedent holds that children and their parents do not surrender their constitutional rights in educational environments. Undoubtedly, litigation concerning a state's right to control certain aspects of nonpublic education will continue, fueling the search for a nebulous line separating state interests from the free exercise rights of the individual.

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[116] Donovan, 573 F. Supp. at 325, 326. In an interesting argument, the government claimed that if it did not force minimum wage guidelines to be respected by parochial schools, it would in effect be giving them an unfair economic advantage over other private schools and, thus, work unconstitutionally to establish religion.

[117] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[118] Delconte v. State, 308 S.E.2d 898 (N.C. App. Ct. 1983).

[119] *Id.* at 904.

[120] Burrow v. State, 669 S.W.2d 441 (1984).

[121] *Id.* at 443-44.

[122] *Id.* at 444 (Justice Purtle concurring).

Conclusion

A definitive line marking the proper distance between church and state has eluded jurists for two hundred years, and recent litigation has done little to sharpen the focus. The Supreme Court, in two recent decisions,[123] has tended toward a more accommodating view of church-state involvement. Its decision in the forthcoming *Jaffree, Ball,* and *Felton* cases will give a clearer indication if the wall between church and school has been redesigned.

The United States circuit courts of appeals present a united front in recent cases involving separation of church and school. Absent marked reversals in the pending Supreme Court cases, the circuit courts will likely preserve a high wall between secular and sectarian concerns.

The United States district courts illustrate greater diversity, but in recent years, they, too, have on the whole kept tall the barriers between church and state. State courts seem even more inclined to shield schools from religious activity. Again, the current cases before the Supreme Court will influence future lower court decisions.

Despite judicial proclivity to view with suspicion any attempt to interject religion in schools, politicians have taken advantage of a religious awakening to promote legislation designed to lower the wall between church and state. In addition, five Supreme Court Justices have reached the age of 75; Reagan appointees would likely take a more tolerant view of religion in public life.

In sum, our country will continue to struggle with the elemental tension between a religiously devout but diverse people and a secular government. Barring a celestial miracle, the truth is not likely to be found, even by those who now so earnestly debate the issues.

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[123] Mueller, 103 S. Ct. 3062, Lynch v. Donnelly, 104 U.S. 1355 (1984).

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Current Litigation Involving School Finance Issues

William E. Sparkman

This chapter contains an overview of selected school finance cases litigated in local, state, and federal courts with decisions rendered in the final months of 1983 and during 1984. An attempt has been made to select a wide range of cases illustrating the variety of fiscal issues confronting the states and local school districts. While some of the cases reported may not have a direct connection to school finance, the fiscal implications should be apparent. The first section contains a review of state school finance cases focusing on constitutional challenges and other issues. The next two sections are directed to cases at the local and federal level. In the final section, the issue of public aid for nonpublic schools is presented.

State School Finance Litigation

Constitutional Challenges

There have been no state supreme court pronouncements on school finance litigation since 1983, when the highest courts in Maryland and Arkansas reached contrary decisions with respect to the constitutionality of their state's school finance law.[1] Because there are extensive summaries of previous school finance cases available elsewhere, this section focuses only on school finance litigation during 1984.[2]

In *East Jackson Public Schools v. State,* the Michigan Court of Appeals upheld the constitutionality of the state's school finance system.[3] Twenty school districts had sought a declaratory judgment that the system of financing public schools violated the state's constitution because of disparities in per-pupil funds between the districts. Their arguments were summarized in three allegations. First, the unequal funding violated the state's education article of the constitution. Second, the state constitution created a specific constitutional right to equality of educational finance support which was denied by the school finance formula. Third, the operation of the school finance system denied students the equal protection of the law under the state constitution. The trial court granted the state's motion for summary judgment and dismissed the complaint.

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[1] The Maryland Supreme Court in Hornbeck v. Somerset Cty. Bd. of Educ., 458 A.2d 758 (Md. 1983) upheld the state's school finance law. The school finance system in Arkansas was declared unconstitutional in Dupree v. Alma School Dist. No. 30, 651 S.W.2d 90 (Ark. 1983).

[2] *See e.g.,* Alexander & Salmon, *Developments in Public School Finance: Keeping the Doors Open,* in School Law in Changing Times 206 (M. A. McGhehey ed. 1982); Sparkman, *School Finance Litigation in the 1980s,* in Educators and the Law: Current Trends and Issues 96 (Thomas, Cambron-McCabe & McCarthy eds. 1983); Cambron-McCabe, *The Changing School Finance Scene: Local, State, and Federal Issues,* in School Law Update: Preventive School Law 106 (Semler & Jones eds. 1984).

[3] 348 N.W.2d 303 (Mich. Ct. App. 1984).

In quick succession, the court of appeals rejected the school districts' allegations. The court held that education was not a fundamental right under Michigan's constitution and that the state's education responsibility was not synonomous with the alleged obligation to provide equal school finance support. Furthermore, there was no denial of equal protection. The court also addressed the issue of whether the school districts had standing to sue. It concluded that the school districts lacked standing to bring the action, because they were merely creatures of the state without power to bring suits to overturn legislation.

In February 1984, the Supreme Court of New Hampshire returned to the superior court a challenge to the state's school finance system.[4] The superior court was directed to determine whether the parties were in disagreement over the "fundamental threshold issue." That threshold issue, according to the supreme court, was the relationship between financial inputs and measurable educational achievement. After reviewing the extensive record of the case, the supreme court noted that the absence of material on the cost-quality issue as well as the size and scope of the record warranted returning the case for further consideration in the lower court. The plaintiffs have alleged that the state's school finance system violates the education and the equal protection clauses of the New Hampshire Constitution. Because of the heavy reliance on local property taxes to support the ~~schools,~~ the plaintiffs, who are seven property-poor school districts, contend that their students are deprived of equal educational opportunities as compared to students in districts with greater property wealth. The state's position is that education is not a fundamental right under its constitution and is not obligated to provide equal funding for all school districts.[5]

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[4] Jesseman v. New Hampshire, No. 83-371 (N.H. February 13, 1984) (order remanding to the Superior Court for further proceedings).

[5] Foster, *N.H. Court Refuses School-Aid Case Pending Ruling on 'merits'*, Educ. Week, March 7, 1984, at 5.

Eleven years after the United States Supreme Court's decision in *San Antonio Independent School District v. Rodriquez,* the Texas school finance system has been challenged as violative of the state constitution. In *Rodriquez,* the Supreme Court upheld the Texas system of school finance against a challenge that it violated the fourteenth amendment's equal protection clause.[6] Rejecting the lower federal court's use of the strict scrutiny standard, the Supreme Court held that education was not a fundamental interest under the constitution nor was a suspect class of persons disadvantaged by the operation of the state's school finance plan. The Court held that there was a rational relation between the finance law and the state's desire to promote and preserve local control of public education. In the years following that decision, the Texas legislature has attempted to address the equalization problems in the school finance plan and has made substantial increases in state education aid. Yet, disparities in per-pupil spending continued to exist because of the vast disparities in local property wealth among the school districts in the state.

On May 23, 1984, seven property-poor school districts filed suit in state court again challenging the Texas school finance law. In *Edgewood Independent School District v. Bynum,* the plaintiffs alleged that the finance system violates the education article and the equal protection clause of the state constitution.[7] Included as a plaintiff in the suit is Demetrio Rodriquez, who filed the original federal court challenge to the Texas school finance plan in 1969. The plaintiffs seek a declaratory judgment that the law is unconstitutional, an injunction against the operation of an illegal finance plan, and attorneys' fees and other costs.

During the summer of 1984, the Texas legislature met in a special session to consider a major school reform package proposed as a result of the Governor's Select Committee on Public Education, headed by H. Ross Perot. Included in the package of education reforms was an overhaul of the school finance law. It remains to be seen whether the new finace law reduces expenditure disparities. The plaintiffs in the pending lawsuit will file an amended petition in order to keep the litigation active. There is likely to be other litigation in the aftermath of the new school finance law. Some districts are considering challenging the Price Differential Index, which was included in the new law to compensate for cost of education differences between the districts resulting from teachers' salaries.

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[6] 337 F. Supp. 280 (W.D. Tex. 1971), *rev'd,* 411 U.S. 1 (1973).

[7] Edgewood Indep. School Dist. v. Bynum, No. 362516 (Tex. Dist. Ct. Travis County filed May 23, 1984).

Enforcement of Previous Decisions

Although the New Jersey Supreme Court in 1976 upheld the facial validity of the state's newly enacted school finance law, it has been alleged that the disparities in per pupil spending have increased in spite of the new law.[8] In February 1981, an action was filed against the state seeking a declaratory judgment that the school finance plan violated the state and federal constitutions. The complaint was dismissed in 1983, for failure to exhaust administrative remedies and plaintiffs appealed.

In *Abbott v. Burke,* the state superior court observed that the trial court erred in dismissing the complaint because it misinterpreted the plaintiff's claim to relief.[9] According to the court, the relief sought was a declaration that the school finance law was unconstitutional, instead of the correction of deficiencies in school programs, services and facilities. The fact that the plaintiffs were seeking redress of an alleged constitutional violation precluded an administrative remedy. The superior court concluded that the doctrine of exhaustion of administrative remedies is not applicable when "[t]he issue to be decided is solely one of law, involving a question of constitutionality which is beyond the power of the Commissioner to decide . . . ."[10] The order of dismissal was reversed and the case was remanded for a plenary hearing.

According to the Superior Court of Connecticut, the state has failed to meet its constitutional requirement to provide a substantially equal educational opportunity to its public school students because the school finance law is not "appropriate legislation" to that end. The court in its April 1984, decision in *Horton v. Meskill* found that the state was unable to show a compelling interest to justify various elements of the school finance plan that were found "to impinge on the fundamental right to an education."[11]

Even though the litigation was a challenge to the present school finance law, the court found that it was technically a continuation of the original action commenced in *Horton v. Meskill* in 1974.[12] Three years later, in 1977, the state supreme court affirmed a lower court's ruling that the existing system of school finance violated the state constitution.[13] The legislature adopted, under court pressure, a new school finance plan in 1979, consisting of two major components: the

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[8] Robinson v. Cahill, 355 A.2d 129 (N.J. 1976).

[9] 477 A.2d 1278 (N.J. Super. Ct. App. Div. 1984).

[10] *Id.* at 1285.

[11] Horton v. Meskill, No. 185283, slip. op. (Conn. Super. Ct. April 24, 1984).

[12] *Id.* at 3, 31 Conn. Supp. 377 1974).

[13] *Id.,* Horton v. Meskill, 376 A.2d 359 (Conn. 1977).

Guaranteed Tax Base Grant Formula (GTB) and the Minimum Expenditure Requirement.

It should be recognized that the superior court in its recent decision did not find the GTB formula unconstitutional. What was at issue was the level of funding under the formula and various amendments to the 1979 law that perpetuated fiscal and educational disparities among the school districts. The court agreed with the plaintiffs' contention that elements of the school finance law were not appropriate, and ordered the state to take corrective action to bring the law into constitutional compliance. First, the court concluded that the minimum aid provision was unconstitutional and enjoined its distribution. Second, it held that the three-year old data requirement used in determining certain formula elements was unconstitutional and ordered that all data be no less than two years old. Third, the court concluded that the proposed funding levels and phase-in extension were violative of the constitution and ordered state officials to distribute funds necessary to provide a funding level of 100% of the GTB. Fourth, the court ordered the state board of education to take appropriate action to enforce compliance with a fully implemented minimum expenditure requirement. Fifth, the court concluded that the optional program of study for grades 9-12 provided in statutes was inappropriate and, therefore, unconstitutional.[14] The defendant Canton Board of Education was ordered to adopt and implement the core curriculum enacted by the legislature for high school graduates of the 1987-88 school year. In addition, the state board was directed to enforce the implementation of the core curriculum in all school districts. Finally, the court granted a stay of its decision until the state supreme court rules on appeal.

Reduction in State Aid

In an effort to control public taxes and spending, Michigan voters approved an amendment to the state constitution, known as the Headlee Amendment, to be effective December 22, 1978. The amendment prohibits, among other things, the state from reducing its proportionate share of the financing of the "necessary costs" of existing activities or services required of local government by state law. Because of severe economic problems experienced by the state in recent years, there has been a reduction in the amount of state aid available to the local school districts. School districts began to challenge the state's right to reduce school aid in view of the provisions of the Headlee Amendment.

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[14] *Id.*, Supplemental (Modified) Judgment (May 29, 1984).

The Michigan Court of Appeals in *Durant v. Department of Education* has interpreted the Headlee Amendment as it applies to school districts.[15] The court first noted that "education," though required by the state constitution, was too indefinite to be considered an existing activity or service required by state law. According to the plain language of the Headlee Amendment, state law refers only to statutory enactments and state agency regulations. The court reviewed the state code and found that it contained several identifiable activities and services which school districts must provide including driver education programs and courses in the constitution, history, government, civics, health, physical education, bilingual instruction (in school districts with twenty or more children of limited English-speaking ability), and special education. Also, auxiliary services that are provided to public school students must be provided to non-public school students. All other activities and services, according to the court, are completely a matter of local discretion and "do not fall within the purview of the Headlee Amendment because they are not specifically mandated by the state legislature or a state agency."[16]

"Necessary costs" were defined as "those which are essential to the completion of the intended purpose of the state mandated activity."[17] The court determined that such costs would be computed on a statewide basis rather than locally. In reviewing the type of state aid available to local school districts, the appeals court concluded that the state was not required to maintain the level of unrestricted aid to a district that was being provided at the time the Headlee Amendment went into effect. However, the state's proportionate share for the necessary costs of the categorical programs (those required of the school district by law) must be maintained at the pre-Headlee Amendment levels. Even though the district's claim was dismissed by the court, the district was allowed the right to a review before the local governments claims review board for a factual determination of whether the costs incurred by the district for the categorical programs were excessive or necessary.

Vouchers

School reform mandates typically emerge from government bodies such as state legislatures or local school boards. A recent grassroots approach in Colorado suggests that government bodies may be bypassed in order to bring about changes in the educational system through constitutional amendment. A group of Colorado residents attempted, through the initiative process, to get a proposed state constitutional amendment on the November 1984 general election ballot. The substance of the proposed amendment would have required the legislature to establish a core curriculum in the public secondary schools, to provide merit pay for teachers, and to institute a voucher system for financing all public and nonpublic schools.

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[15] Durant v. Department of Educ., 342 N.W.2d 591 (Mich. App. 1983). *See, e.g.*, Waterford School Dist. v. State Bd. of Educ., 344 N.W.2d 19 (Mich. App. 1983) (where the court, following its ruling in *Durant*, dismissed school district's complaint that the reduction in state education aid did not violate the terms of the Headlee Amendment).

[16] *Id.* at 596.

[17] *Id.* at 597.

The Colorado Education Association filed suit claiming deficiencies in the title of the proposal, the ballot title, and the submission clause. The state supreme court heard the case and noted that its role was "to determine whether the descriptive documents fairly represent the purpose of the proposed amendment."[18] The plaintiffs had alleged that the documents in question failed to reflect certain limiting language contained in the proposed amendment. They claimed that the omission of the limiting language should invalidate the proposal. After reviewing the documents, the court found that the phrases "required by law to be educated therein" and "which are not pervasively sectarian" contained in the proposed amendment were omitted from the proposed title. The supreme court concluded that the documents failed to describe the "class of students and the character of the institutions" affected. Without the limiting phrases, the documents "do not fairly reflect the contents of the proposed amendment."[19] The court remanded the case to the Initiative Title Setting Board with directions to add the missing phrases in the appropriate places in the title, ballot title, and submission clause to correct the omission. The proponents of the initiative, after the defects were cured, failed to get the number of signatures necessary to get the proposal on the November ballot.

Local Fiscal Issues

While federal and state litigation involving school finance issues tends to gain the most attention in the education community, local school districts engage in a variety of legal conflicts with fiscal implications. While some issues may not involve school districts directly, the fiscal impact is clear (e.g. property tax examptions). Other issues have a direct bearing on the local treasury. This section contains a review of selected cases to illustrate the diversity of legal issues impacting on school finance at the local level.

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[18] *In re* Proposed Initiated Const. Amend. of Educ. 1984, 682 P.2d 480 (Colo. 1984).
[19] *Id.* at 482.

Property Tax Exemptions

The question of whether certain real properties qualify for tax exempt status continues to have a prominent place in local school finance issues. Whether the property in question is used for a religious, educational, or other not-for-profit reason and qualifies for tax exemption is a frequently litigated issue. Most of these cases involve a local board of assessors or local government rather than a school district since local tax appraisal and collection functions typically are performed by county government.

The Illinois Supreme Court in 1983 upheld the facial constitutionality of legislation granting property tax exemptions for parsonages, fraternity and sorority houses, and homestead improvements on property owned and occupied by a natural person for residential purposes.[20] In regard to the exemptions for parsonages and fraternity and sorority houses, the court noted that the use of the facility was determinative of its eligibility for tax exempt status. If the facilities were primarily used for the exempted purposes, according to the court, the fact that they were used for other purposes does not destroy the exemption. Also, the homestead improvements exemption was declared to be within the legislature's broad powers as authorized by the state constitution. Therefore, the legislation granting the three classes of exemptions was facially valid.

The highest courts in Georgia and Maine recently upheld tax exemptions for fraternity and sorority houses located on college campuses. The Georgia case involved the property of a nonprofit housing corporation formed at the university to provide housing for the chapter members.[21] The court determined that the houses qualified for exemptions as "buildings used for the operation of educational institutions." In Maine, the court found that the fraternity houses were built by the college on campus property as an integral part of its housing system.[22] Because of the location of the fraternity houses on campus property and the degree of control exercised by the college over the fraternities, the court concluded that the chapter houses were used by the college solely for its own purposes and qualified for the tax exemption. The court noted that the incidential use of the chapter houses for recreation and socialization will not defeat the tax exemption.

Whether the property of church organizations is used exclusively for religious purposes has been the subject of cases in Illinois and Texas. The Appellate Court of Illinois determined that the property of the Evangelical Teacher Training Association was used exclusively for religious purposes and was entitled to tax exemption.[23] The association was organized by five Bible colleges for the purpose of upgrading Christian education in seminaries, adult programs, and Sunday schools. Its activities included the preparation and sale of Bible study materials and speaking and lecture services by its officers. The court noted that "[w]hether a party has been organized and operated exclusively for an exempt purpose is to be determined from its charter and by-laws and the actual facts related to its method of operation."[24] The court found that the officers were involved in teaching and demonstrating teacher-training methods that served to accomplish directly the organization's religious purpose.

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[20] McKenzie v. Johnson, 456 N.E.2d 73 (Ill. 1983).
[21] Johnson v. Southern Greek Housing Corp., 307 S.E.2d 491 (Ga. 1983).
[22] Alpha Rho Zeta v. Inhabitants of Waterville, 477 A.2d 1131 (Me. 1984).

A Texas court ruled on the question of whether property owned by the Texas Conference of Seventh-Day Adventists, which was used as a ranch in conducting the "religious, educational, and physical development" of young people, qualified for tax exempt status.[25] The court found that a change in statutory language affected the tax exemption. The statute in effect prior to 1980 required that in order for an association to qualify for tax exemption it had to be, among other things, "*engaged*" in the joint and threefold ... development of young people (emphasis added)." The ranch qualified for the exemption under that statute. The statute was amended in 1980 to require an association to *engage primarily* in the three specified activities. The court held that the association was not entitled to the exemption under the amended statute because it was not engaged primarily in the required activities. The court concluded that the association engaged primarily in religious activities and that the development activities conducted on the ranch were subordinate to its religious mission.

Nonprofit organizations in a community often argue that they should be exempt from local property taxes since they enjoy federal tax exempt status. A nonprofit school for gymnastics and performing arts was not entitled to property tax exemption as "property used for public or charitable purposes," according to the Supreme Court of Vermont.[26] Since the school was not providing an essential government function and since its services provided private benefits to a limited class of persons, it was not entitled to tax exemption.

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[23] Evangelical Teacher Training Ass'n v. Novak, 454 N.E.2d 739 (Ill. App. Ct. 1983).

[24] *Id.* at 741.

[25] Texas Conference Ass'n v. Leander Indep. School Dist., 669 S.W.2d 353 (Tex. Civ. App. 1984).

[26] Ski-Lan Gymnastics v. City of Rutland, 465 A.2d 1363 (Vt. 1983).

Sometimes a unit of government can act beyond its authority in granting or promising to grant tax exemptions. An interesting case arose in New York where a school district adopted a resolution that tax exemption be granted to the owners of a resort hotel in return for the owner's offer to pay 100% of the assessed taxes in lieu of taxes, if casino gambling were legalized in the state and if the owners were to institute gambling at their proposed hotel site.[27] The resolution was challenged by local taxpayers as beyond the authority of the school board. The court determined that the actions of the owners of the proposed hotel and the school board constituted a contract and that the school board made the tax exemption resolution pursuant to the contract. According to the court, the resolution was null and void as an attempt of the school board to bargain away or sell its powers.

When school districts are involved with other units of local government in litigation involving tax exemptions, they should be certain to appear in the action and not rely on the other units of government to protect their interests. A religious corporation brought an action against a school district, town, and county for a declaratory judgment that it was a tax exempt organization and entitled to tax exemption.[28] The school district failed to appear in the action and a default judgment was entered against it. In refusing to vacate the judgment, the court held that the school district did not show a valid excuse for failing to appear in the action and that it lacked a meritorious defense. The court found that the district had made an *ex parte* determination that its interest would be protected by the town's defense of the tax assessment because it believed that the action against it was "contingent upon and derived from the town's assessment." The result of the default judgment was that the religious organization was relieved of paying the school taxes for all the years in question; whereas, in the settlement with the town and county, the organization was required to pay property taxes for two of the years.

Disposition of Interest Earned on School Funds

Most school districts rely on other units of local government to be the tax collection agency. Typically, local property taxes are collected by county government and distributed to the school districts on a periodic basis. With a good cash management program, substantial interest can be earned through the investment of the undistributed tax revenues. School districts have increasingly asserted their right to the interest earned on the tax revenues collected on their behalf by another unit of local government.

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[27] Citizens to Save Minnewaska v. New Paltz Cent. School Dist., 468 N.Y.S.2d 920 (N.Y. App. Div. 1983).

[28] D'Betlan v. Town of Shandaken, 473 N.Y.S.2d 71 (N.Y. App. Div. 1984).

Several school districts located within Tulsa County (Oklahoma) brought an action against county officials seeking, among other things, a declaratory judgment that they were entitled to receive all interest earned on state and local tax revenues apportioned to them by the county.[29] At issue in the controversy were two statutes: a special statute requiring that all interest revenues be apportioned and credited to the common school fund of the county and a general statute controlling the duties of county officials in various fiscal matters. In a matter of statutory construction, the state supreme court held to the established position that "where there are two statutory provisions, one of which is special and clearly includes the matter in controversy, and prescribes different rules and procedures from those in a general statute, the special statute . . . applies."[30] Therefore, the school districts were entitled to the interest from the county under the special statute.

An Oregon court reached a similar conclusion in a dispute between a school district and county over accrued interest on mineral lease income received by the county.[31] During the 1930's, the county had foreclosed numerous deliquent tax liens and sold the land, but reserved the mineral rights. The county began leasing those mineral rights for oil and gas production in 1975. The income from the leases was deposited in the county general fund and periodically the mineral lease income, but not the interest earned on it, was distributed to various governmental entities, including the school districts. One of the county's school districts filed suit for a declaratory judgment that it was enitled to a prorata share of the interest earned on the mineral lease revenues. The state appeals court sustained the trial court's determination that school districts were to receive annually the accrued interest. The appeals court found that since the legislature had designated the funds which go to each local government unit, the county was without discretion in the allocation of those funds. According to the court, the counties, however, were entitled by statute to 10% of the principal and interest from the mineral leases as administrative costs.

As the result of a recent action by the Colorado Supreme Court, some school districts in the state are not entitled to interest earned on local tax revenues collected by the county.[32] The court held that although a state statute does require counties to credit to the school districts interest earned on funds collected through county tax levies, the statute did not apply to those school districts which elected to have the county apportion the tax revenues at regular intervals. The court determined that taxes received by the county for school tax levies were county funds until allocated and distributed to the electing school districts.

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[29] Independent School Dist. No. 1 v. Board of County Comm'rs, 674 P.2d 547 (Okla. 1983).

[30] *Id.* at 550.

[31] State *ex rel.* School Dist. No. 13 v. Columbia City., 674 P.2d 608 (Or. Ct. App. 1983).

Validity of School District Residency Requirements

The authority of school districts to enact residency requirements pursuant to state statutes and to assess a tuition fee on nonresident students continues to provide legal challenges. Even though the United States Supreme Court in *Martinez v. Bynum* upheld the facial constitutionality of a Texas statute establishing residency for school purposes, local residency guidelines adopted and implemented to state statutes have been challenged.[33] In *Rodriquez v. Yselta Independent School District*, a challenge was made to a local policy denying tuition free admission into its schools in those cases where a school-age child lives separate and apart from his parents, guardians, or other persons having legal control of him under a court order.[34] Mirella Hermosillo was left by her natural mother in the care and control of Margarita Rodriquez when the child was six months old. Mr. and Mrs. Rodriquez, who were permanent residents of the school district, reared the girl and provided her sole support. When Mirella was school age, she was granted admission into the public schools on a tuition-free bases contingent upon the Rodriquez family securing a legal guardianship. Mrs. Rodriquez did not want to assume a legal relationship with Mirella at that time. She filed suit against the school district alleging that the local admission policy denied the child a tuition-free public school education in violation of state statutes and the equal protection clauses of the federal and state constitutions.

The Texas Court of Civil Appeals found that the school district's policy was inconsistent with the residency standards in state statute.[35] This inconsistency, however, was not sufficient to defeat the local policy since the court concluded that it was promulgated and adopted pursuant to another statute, which contained the legislature's broad grant of discretionary power giving school trustees "the exclusive power to manage and govern the public free schools of the district.[36] The local policy, though different from the residency provided in state statute, was upheld as being within the discretion of the school board. In addition to this central ruling, the court found no violation of equal protection or due process.

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[32] Calhan School Dist. No. 1 v. El Paso Cty., No. 83SC255, slip. op. (Colo. August 20, 1984).

[33] Martinez v. Bynum, 103 S. Ct. 1838 (1980).

[34] Rodirquez v. Yaleta Indep. School Dist., 663 S.W.2d 547 (Tex. Civ. App. 1983). *See also* Harris v. Hall, F. Supp. 1054 (E.D.N.C. 1983) (where a federal district court upheld the facial constitutionality of North Carolina statutes containing the following challenged features: a domicile requirement for determining the residential status of students, a custody provision requiring that a student live with a parent or guardian domiciled in the district, and a tuition charge for students who are not domiciled in the district).

In reaction to severe budget cuts in the federal impact aid programs, the Onslow County (North Carolina) Board of Education adopted a policy requiring that all nondomiciliary students enrolled in the county's public schools be charged tuition. Since Onslow County is the location of a large United States Marine Corp installation, Camp Lejeune, the direct impact of the policy was on federally-connected students.

The United States government filed suit against the school board alleging that the tuition requirement violated the constitution's supremacy clause and breeched a contract between the government and the board of education.

The position of the United States was affirmed by the Fourth Circuit Court of Appeals in *United States v. Onslow County Board of Education*, in 1984.[37] The court of appeals first considered the contract question and found that the written assurances provided by the school district to the federal government as a condition for the receipt of impact aid for school construction constituted a contractual obligation. One of the written assurances was a commitment on the part of the school district to provide education to federally-connected students on the same basis as other students so long as the buildings constructed with impact aid remain in use. Since the imposition of the tuition fees on predominately the federally-connected children constituted a breech of contract, then the United States government was entitled to sue for specific performance.

In regard to the constitutional issues, the court held that the tuition charge was a tax substitute prohibited by the Soldiers' and

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[35] Tex. Educ. Code Ann. § 21.031(d) (Vernon Supp. 1982) provides that a student can establish residency for school purposes separate and apart from his parent, guardian, or other person having legal control of him under an order of a court, if his presence in the school district is not for the primary purpose of attending the public schools. The Yaleta I.S.D. policy denies tuition-free admission for such students.

[36] Tex. Educ. Code Ann. § 23.26 (Vernon Supp. 1982).

[37] 728 F.2d 628 (4th Cir. 1984).

Sailors' Relief Act under the supremacy clause of the United States Constitution; that the tenth amendment could not be used as a defense to congressional action authorized by the war powers provision of the Constitution under which authority Congress enacted the Soldiers' and Sailors' Relief Act; and that the tuition charge discriminated against federally-connected persons, which was considered to be discrimination against the federal government prohibited by the supremacy clause.

Other Local Fiscal Issues

School districts confront a variety of other legal issues with fiscal consequences as illustrated by several recent cases. One of the more notable cases from California where the state supreme court in *Hartzell v. Connell* ruled that it was unconstitutional for school districts to charge students fees for participation in extracurricular programs.[38] The court found that extracurricular programs were educational in character and fell within the free school guarantee of the state constitution. The imposition of fees for participating in such activities, according to the court, would be a constitutional violation. The fact that the school district provided waivers to indigent students, or that the district suffered financial hardship, was not sufficient to overcome the constitutional defect in the activity fees.

The tortuous road of litigation is illustrated by a Pennsylvania school transportation case that has been heard in the federal district and appeals courts on two occasions and may well be heard by a state court. The case began when parents challenged a school board's decision to eliminate round-trip bus service for children in the district's half-day kindergarten program in favor of one-way trips depending on which session the child attended. In the most recent decision in the case of *Shaffer v. Board of School Directors*, the Third Circuit Court of Appeals reversed the district court's order supporting the school board's policy.[39] Finding no constitutional flaw in the school board's transportation rule, the appeals court remanded the case to the district court with instructions to dismiss the pendent state claim without prejudice. The appeals court concluded that the lower federal court had abused its discretion in retaining jurisdiction over a state law claim in the absence of a federal constitutional question and in view of the fact that the issue had important implications for public education in the state.

Where a school district overpays teachers by mistake, it cannot withhold a portion of their salaries in an attempt to recover the overpayments, according to the Texas Court of Civil Appeals.[40] Finding that the school district was a creditor, the court ruled that it had no right to resort to self-help through salary deductions, an action prohibited by the state constitution and statutes.

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[38] 679 P.2d 35 (Cal. 1984).

[39] Shaffer v. Board of School Directors, 730 F.2d 910 (3d Cir. 1984).

Several families in a Nebraska school district sent their children to high school in a nearby South Dakota school district because it was nineteen miles closer to their home than the local high school. When the local school board denied the parents' request for tuition payments, they appealed to the state board of education for a reversal of the local board's decision. The board's action was sustained and the state supreme court had to determine whether the state board's decision was supported by sufficient evidence and if it was arbitrary and capricious. The court concluded that sufficient evidence did exist and that the decision was not arbitrary and capricious even though the students would have to travel a greater distance to their local high school than to a closer one outside of the state.[41]

In September 1984, a federal district court in Philadelphia ruled that school districts may file a class action suit against fifty-five manufacturers to recover the costs of asbestos removal.[42] School districts that have already removed asbestos will be able to join in the suit to recover money already spent in the removal efforts. It was reported that the court held that the class action would not be available to individual schools that may elect to sue the asbestos manufacturers for compensatory damages. In order to sue for punitive damages, however, the districts must join in the class action.

Federal Aid Issues

Title I Recovery

In *Bell v. New Jersey and Pennsylvania,* the United States Supreme Court held that the federal government had the right to recover misspent title I funds from the states.[43] the court noted that the proper way for the government to assert its right was through administrative proceedings in the department of education with the states retaining the right to judicial review of the department's final decision. The purpose of court review would be to determine if the agency's final decision was supported by substantial evidence or if the proper legal standards were applied. The case was remanded to the court of appeals for a review of the issues involved in the states' challenges to the department of education's holding that they were liable to the federal government for misapplied title I funds. Specifically, the Supreme Court noted that the primary question on remand was whether the substantive standards of the 1978 amendments to the Elementary and Secondary Education Act (ESEA) apply to title I grants made under preexisting law.

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[40] Benton v. Wilmer-Hutchins Indep. School Dist., 662 S.W.2d 696 (Tex. Civ. App. 1983).

[41] Richardson v. School Dist. No. 10, 348 N.W.2d 873 (Neb. 1984).

[42] School Dist. of Lancaster v. Lake Asbestos (E.D. Pa. 1984) (No. 83-0268).

[43] 103 S. Ct. 2187 (1983).

The court of appeals in *State of New Jersey v. Hufstedler* considered New Jersey's claim that the attendance area eligibility standards contained in the 1978 amendments should be applied retroactively.[44] The original regulations provided that an attendance area qualified for title I funding based on either the number or percentage of children from low-income families as compared to the other attendance areas or the school district as a whole. In 1978, Congress amended ESEA to permit local school districts, under certain circumstances, to declare a school attendance area eligible for title I aid of at least 25% of the children in that area were from low-income families.

New Jersey maintained that the 1978 standards should be the basis for determining the eligibility of attendance areas to receive title I funds, even though the eligibility decisions had been made prior to 1978. The nub of the problem was that during 1970-72, Newark determined title I eligibility using a method that overstated the percentage of children from low-income families. The court of appeals noted that the state had raised this argument for the first time on appeal, but concluded that it had discretion to consider the issue.

In deciding that the 1978 amendments applied retroactively, the court concluded that such an application would not result in "manifest injustice" and that nothing in the amendments or their legislative history could be found that would preclude retroactive application. The court felt that Congress was aware of the inequities caused by the application of the original standards and had amended the law with the intention that the changes be applied to previous decisions. The case was remanded to the secretary of education to determine which school attendance areas in Newark that had title I projects in question during the relevant years would qualify under the 1978 standards. The federal government appealed the decision and the United States Supreme Court has granted *certiorari*.

In another title I recovery case, the Seventh Circuit Court of Appeals affirmed a decision of the Education Appeal Board that Indiana must refund $932,482 in misspent title I funds to the government[45] Indiana had sought review of findings that title I funds had supplanted state and local funds in several programs and that another program was not designed to meet the special educational needs for targeted children. The court found that it was shown in the administrative hearing by uncontroverted evidence that Indiana had funded three programs in title I schools solely from title I funds, while similar programs were supported by state and local sources in the nontitle I schools. This practice was determined to be in violation of three requirements of the law. First, federal funds were supplanting state and local funds in the support of title I projects. Second, state and local funds were not being used to provide comparable services in the programs since they were supported entirely by title I funds. Third, the special educational needs of educationally deprived children were not met since they received the same programs in the title I schools as were provided with state and local resources in the nontitle I schools. Important to the court's decision affirming the appeal board's findings on these points was that Indiana failed to present evidence to the contrary when it had the opportunity to do so during the administrative hearing.

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[44] 724 F.2d 34 (3d Cir. 1983), *cert. granted sub nom.* Bell v. New Jersey, 53 U.S.L.W. 3235 (U.S. October 1, 1984) (No. 83-2064).

The final point of review focused on whether a title I teacher aide project met the special educational needs of the targeted children. Evidence had shown that the teacher aides were assigned indiscriminately to serve all teachers and students in the title I schools, without any attempt to match the aide assignments to the special needs of the eligible children. Indiana's argument that the "overwhelming majority" of children in the target area were eligible for title I was to no avail. The court affirmed the administrative decision on all contested points.

School Lunch Regulations

Many schools have found it lucrative to sell snack foods during the school day. The sales generally occur through vending machines or student organizations with the profits being used for school-related purposes. These snack foods often compete with the food sold through the school breakfast and lunch programs. Several attempts have been made by congress and the department of agriculture to control the sale of nonnutritious foods in schools receiving federal school breakfast and lunch funds. One of the more recent attempts involved regulations prohibiting the sale of several categories of snack foods, including soft drinks, throughout the schools until after the last lunch meal of the day. A national trade organization representing the soft drink industry challenged the regulations alleging, among other things, that the secretary of agriculture had exceeded his authority by limiting the time and place of the sale of snack foods.

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[45] State of Indiana Dept. of Pub. Instruction v. Bell, 728 F.2d 938 (7th Cir. 1984).

The federal appeals court held that although the secretary was authorized to regulate the sale of soft drinks, the time and place restrictions were beyond his authority.[46] Interpreting the language used by Congress, the court concluded that the regulations must be restricted to the sale of competitive foods in "food service facilities or areas during the service of food." While the decision upheld the secretary's authority to regulate competitive foods, including soft drinks, it did require that the regulations be no more limiting than restrictions found in the authorizing legislation.

Desegregation Funding Dispute

In an eighteen month legal battle, the Chicago Board of Education and the federal government have been at odds over the government's financial responsibility for the board's desegregation plan under the terms of a 1980 consent decree. On June 30, 1983, a federal district court entered an order that the government had not made a good faith effort to find financial resources to assist in Chicago's desegregation plan required by the consent decree.[47] The judge ordered a freeze on $47.5 million in the department of education's fiscal 1983 funds and directed the department to find funds for the desegregation effort. The Seventh Circuit Court of Appeals in a September 1983, decision agreed that the federal government had violated the consent decree by not providing funds, but concluded that the district court had acted with "excessive dispatch" in delineating specific remedies.[48] The court opined that the federal government should have been allowed to come into compliance voluntarily. The case was remanded with directions that the lower federal court have a hearing to determine the amount of funds adequate for the desegregation plan.[49]

In a lengthy 116 page opinion, the district court on remand ruled on June 8, 1984, that the federal government "willfully and in bad faith" violated the consent decree.[50] The court approved a $171.6 million funding level for the board of education's 1984-85 desegregation plan. It determined that Chicago could pay $67.7 million of the cost and ordered the government to pay the remaining $103.8 million. In August, the district court filed a supplement to the June remedial order reiterating the federal government's obligation of $103.8 million but ordered that no less than $20 million must be provided by August 22, 1984. The federal government was ordered to provide to the board of education $17 million from the secretary of education's fiscal 1984 discretionary fund and $11.8 million from title IV funds if it failed to provide the full $103.8 million by the deadline.

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[46] *Id.*

[47] National Soft Drink Ass'n v. Block, 721 F.2d 1348 (D.C. Cir. 1983).

[48] United States v. Board of Educ., 567 F. Supp. 272 (N.D. Ill. 1983).

[49] United States v. Board of Educ., 717 F.2d 378 (7th Cir. 1983).

[50] United States v. Board of Educ., 592 F. Supp. 967 (N.D. Ill. 1984).

The government was successful in having that order stayed by the Seventh Circuit Court of Appeals. On September 26, 1984, the court of appeals ruled that the federal government did not have to pay the $103.8 million in desegregation aid to Chicago.[51] However, the government was ordered to give the board of education preference for such funds provided that the district meets the program criteria. The appeals court found that the trial court had abused its discretion with the funding order and remanded the case to a different district court judge. The board of education has requested a rehearing by the court of appeals.

Public Aid to Nonpublic Schools

States and local school districts have used a variety of methods over the years to provide financial assistance to nonpublic schools. Many of these efforts have been challenged in the courts as violations of the first amendment's establishment clause. While some cases have involved single programs such as textbooks, transportation, or shared or released time, others have involved multiple programs of direct or indirect support. The court results have been mixed and, at times, unpredictable. Since 1971, courts have used the *Lemon* test as a basis for evaluating government aid to nonpublic schools.[52] Under this triparte test, a state must have a secular legislative purpose, its primary effect must be one that neither advances nor inhibits religion, and it must not foster excessive government entanglement. It remains to be seen whether the *Lemon* test will continue to be a viable standard in establishment clause cases.

The two most recent cases have been in Michigan and New York. Both cases involved cooperative educational arrangements between the public schools and nonpublic schools. Taxpayers challenged the programs as an establishment clause violation. In *Americans United for Separation of Church and State v. School District of Grand Rapids*, the Sixth Circuit Court of Appeals in 1983, declared unconstitutional the shared time and community education programs operating within church-related schools at public expense.[53] Under the Shared Time program, the school district offered courses from its regular curriculum to nonpublic school children during school hours. The courses were taught by public school teachers in classrooms leased by the school district from the participating non-public schools. The Community Education programs provide a variety of educational and other enrichment opportunities for public school children as well as children in the nonpublic schools. The courses were taught by public school employees under the control and supervision of the school district. The classes offered at the nonpublic schools were conducted in rooms leased from the school by the public school district.

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[51] Ashworth, *Appeals Court Dumps Chicago Desegregation Funding Order*, Educ. Daily, Sept. 28, 1984, at 1-2.

[52] Lemon v. Kurtzman, 403 U.S. 602 (1971).

Although the court of appeals found that the programs had a secular purpose, it held that their primary effect was the advancement of religion. According to the court, the facts of the case led it to conclude the following: the nonpublic schools involved in the programs were religious with the advancement of religion as their primary mission; the students in the participating schools received the benefits of public school courses without leaving their school, a substantial number of teachers in the programs were either former or current employees of the nonpublic schools; the supplementing of the teachers' salaries was a direct benefit to the teachers in the programs and an indirect benefit to the religious mission of the schools; and a substantial amount of classroom time and tax money was involved in the programs. The court noted that there would have to be "[c]onstant secular inspection and surveillance of all activities not specifically labeled religious" in order to maintain any separation at all.[54] Finally, the court was cognizant of the potential for political divisiveness associated with the type of programs and their costs. The United States Supreme Court has granted *certiorari* in the case with a decision expected during the 1984-85 term.[55]

A constitutional challenge has been made to the New York City Board of Education's practice of sending title I teachers into religious and other nonpublic schools to provide remedial instruction and clinical and guidance services to eligible students. The Second Circuit Court of Appeals in 1984, held that the practice violated the establishment clause.[56] Under the statutory provisions of title I, qualified children from public as well as private schools were to benefit from programs developed pursuant to the law. Beginning in 1966, New York City adopted a program whereby title I programs and services would be provided in the nonpublic schools to eligible students by itinerant public school teachers. This practice has continued to the present time. The constitutional problem in the arrangement arose from the fact that most of the nonpublic schools were religious. It was reported that in 1981-82, 92% of the nonpublic school students attended Catholic schools and Hebrew day schools.

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[53] 718 F.2d 1389 (6th Cir. 1983).

[54] *Id.* at 1406.

[55] Americans United for Separation of Church and State v. School Dist., 718 F.2d 1389 (6th Cir. 1983), *cert. granted sub. nom.* School Dist. v. Ball, 52 U.S.L.W. 3631 (U.S. February 27, 1984) (No. 83-990).

[56] Felton v. United States Dept of Educ., 739 F.2d 48 (2d Cir. 1984), *review granted,* 53 U.S.L.W. 3257 (U.S. October 9, 1984) (84-238).

The court of appeals, after a comprehensive review of Supreme Court decisions dealing with government aid to religious schools, concluded that public funds can be used to provide title I services to students in religious schools, but only at a neutral site off the school's premises. The court was concerned primarily with excessive entanglement. It noted that in order to ensure that the title I teachers involved in the program would maintain strict religious neutrality, both the teachers and the schools in which they worked must be subjected to "comprehensive, discriminating and continuing state surveillance." The United States Supreme Court has granted *certiorari*.

Another challenge to the use of government funds in nonpublic schools is pending in Rhode Island. Several parents of public school children have alleged that chapter II of the Education Consolidation and Improvement Act of 1981, has involved the federal and state governments in the operation of religiously oriented nonpublic schools in violation of the first amendment. In *Taft v. Pontarelli*, a federal district court permitted the intervention in the case of parents of children attending religious schools.[57] The court found that the parents had a right to resist the challenge to the benefits their children received and that they were not adequately represented by the defendents in the case.

Conclusions

Because the cases presented in this paper were confined primarily to year of 1984 and were so varied in scope, it is impossible to detect any major trends or evolving issues. It is clear, however, that many of the issues litigated during 1984 were not new and will continue to be viable in the near future. For example, challenges to state school finance laws continue to be made by property-poor school districts seeking the equalization of resources or demanding that the state fulfills its constitutional obligation to provide an adequate educational system. The key factor in these cases is whether the courts find that education is a fundamental interest under the state constitution requiring the application of the strict scrutiny standard. Another critical factor is whether the courts interpret the requirement for equal educational opportunity or equal protection as requiring the equal allocation of resources. Finally, whether the state's education program is adequate under the constitution's education article will continue to be a viable issue. The relationship between cost and quality may be an issue that will be considered by the courts. An impediment to school finance suits brought by school districts could be the determination that school districts lack standing to sue as was the holding in *East Jackson Public Schools v. Michigan.*[58] In addition to new constitutional challenges, it is clear that the courts will order enforcement of previous rulings. Perhaps, the unknown variable in state school finance litigation will be the impact of the school reform efforts undertaken in many states on the questions of equity, equalization, and adequacy.

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[57] Taft v. Pontarelli, 100 F.R.D. 19 (D.R.I. 1983).

It is at the local level where the greatest variety of litigation affecting school district finances can be found. The predominant issue seems to be property tax exemptions and whether specific properties qualify for tax exempt status under state tax laws. Although many other issues are raised locally, the primary themes are the same: the protection of the school district's tax base and the conservation of local resources.

Now that it has been established that the federal government has the right to recover misspent title I funds from the states, those states affected will undoubtedly seek judicial review of the findings and orders of the department of education in the federal courts. The use of public funds for nonpublic schools continues to be one of the most persistent legal issues confronted in the courts. This is one issue that likely will continue to generate considerable attention.

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[58] 348 N.W.2d 303 (Mich. Ct. App. 1984).

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Justiciable Performance Standards for Discharging Incompetent Teachers

Delbert K. Clear
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Criteria of Teaching Effectiveness

Over the years, many courts have been asked to examine school district charges that teachers with property or other interest in their positions are not sufficiently competent to continue in them. Where such a vested interest is found, a district bringing such charges must meet a heavy burden of proof in order to prevail. Meeting this burden has traditionally been a difficult task for school administrators because standards of teaching against which to juxtapose an individual teacher's behavior have not been available. Additionally, counsel too often are brought into the cases at the final stages only to discover that proper and usable proof data have not been collected. As a result, dismissals for ineffective teaching, as distinguished from insubordination, immorality, or improper treatment of students, are rare. Districts may simply tolerate substandard teaching, or deal with it by encouraging voluntary resignation, or transfer, or by taking other action short of dismissal. Only where nothing else seems to work, and the pressure for doing something becomes impossible to ignore, is dismissal typically attempted.

The practice of toleration, though widely adopted, is no practice at all — it is abdication that exacts a heavy toll on students. Waiting until the pressure is too great to ignore is equally unsatisfactory because it leads to *post-hoc* formulation of performance standards based on conventional wisdom, personal preferences, past experience, and opportunistic seizing on the events of the moment — that will both "fit" the teacher under scrutiny and appeal plausibly to a court. This results in standards that are unreliable, and often invalid. The injection of arbitration and employment relations board review into the matter does little more than exacerbate the problem for a district: it places into the process additional persons to review the efficacy of the *ad hoc* standards used, thus increasing the probability that the decisions will be upset. As a matter of fact, such *ad hoc* configurations literally beg to be second-guessed by anyone in the process who has a self-perceived better version of standards of effective teaching than those of school officials. Two recent cases illustrate this point.

In Iowa, a teacher with nineteen years of experience was charged by the district with using faulty teaching methods, being insubordinate, instituting inappropriate disciplinary actions, and being unable to relate to students. Both an arbitrator and a trial court agreed with the teacher's claim that the district had failed to justify the charges; an appellate court heard and sustained the lower decisions. The appellate court noted that any defects the teacher had were merely "evidence of professional faults" which should be corrected by nonrepetition or by improvement rather than dismissal.[1]

In Kansas, a teacher who apparently had trouble getting along with students, fellow employees, and the administration, (particularly after he became the teachers' chief negotiator) was charged with the following:

(1) Failure to work with the Administration;

(2) Failure to maintain adequate control of the classroom;

(3) Failure to maintain adequate lesson plans;

(4) Failure to properly care for school livestock over the weekend;

(5) Failure to care for school equipment.[2]

Neither the trial court nor the appellate court could find sufficient evidence to sustain any of the charges. Reading between the lines suggests that this case illustrates the worst of all possible personnel practices — deciding first to discharge a teacher, then formulating standards of performance to justify the decision. The appellate court concluded that, in some of the disputes, the problems were more reflective of "philosophical matters" than of competence. Throughout the case, as well, the absence of stable standards of performance contributed to the board's failure to meet procedural due process requirements.

More often, charges of incompetence are not even brought. Instead teacher dismissals are sought for insubordination or unfitness to teach. A classical example of this approach occurred in Colorado, where, though the district was successful in its efforts, it did not prevail on a showing of the teacher's obviously inefficient performance. Instead, the dismissal was upheld on the charge of insubordination — for the teacher's refusal to comply with the principal's recommendations for improvement. Direct tests of the efficacy of those recommendations against known performance standards and the teacher's personal behaviors were avoided by the appellate court.[3]

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[1] Board of Directors v. Sexton, 334 N.W.2d 341 (Iowa Ct. App. 1983).

[2] Haddock v. Board of Educ., 661 P.2d 368 (Kan. 1983).

Even in cases where the district prevails in direct charges of incompetence, the decisions often reflect the depth of the problem. In 1979, an Iowa court found the dismissal of a teacher justified by the record and commented as follows:

> [P]robably no inflexible "just cause" definition we could devise would be adequate to measure the myriad of situations which may surface in future litigation. It is sufficient here to hold that in the context of teacher fault a "just cause" is one which directly or indirectly significantly and adversely affects what must be the ultimate goal of every school system: high quality education for the district's students. It relates to job performance including leadership and role model effectiveness. It must include the concept that the school district is not married to mediocrity but may dismiss personnel who are neither performing high quality work nor improving in performance. On the other hand, "just cause" cannot include reasons which are arbitrary, unfair, or generated out of some petty vendetta.[4]

Similar hesitation was revealed by a California court which conceded that, even though a teacher's lack of classroom control was sufficient to warrant his dismissal, "[m]aintenance of appropriate classroom behavior is extremely difficult to quantify; one can imagine (with horror) uniform guidelines framed in terms of permissible decibel levels or schedules of acceptable incidents of misbehavior per unit of time or student population."[5]

Success in basing dismissals on unsatisfactory performance is too often limited to those situations where the behaviors are sufficiently egregious to make it virtually unnecessary to articulate the performance standards from which they depart. The effect, though to the

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3. Thompson v. Board of Educ., 668 P.2d 954 (Colo. Ct. App. 1983).

4. Briggs. v. Board of Directors, 282 N.W.2d 740, 743 (Iowa 1979).

5. California Teachers' Ass'n v. Governing Bd., 192 Cal. Rptr. 358, 363 (Cal. Ct. App. 1983).

immediate benefit of the district in which the dismissal occurs, contributes little useful precedent. Worst of all, it seriously limits, in actual practice, any district's ability to enforce standards of teaching that would prove that a "school district is not married to mediocrity."[6] One looks in vain for cases where judges have sanctioned the dismissal of merely weak teachers. Without exception, the successful cases are those where the teacher's misbehavior is extreme. Discharging such teachers, however, is not without problems. Even in these cases, the district's standards are frequently found either absent, faulty, or unevenly applied and the teachers restored to their positions. An Iowa case illustrates: Even though the court upheld the dismissal of a teacher who required excessive homework, caused children to develop emotional problems, caused students be truant, belittled children publicly, and yet resolutely refused to change in any way, it was sternly lectured about the decision in a vigorous and interesting dissent: "Teacher tenure is too important for us to run roughshod over it .... The evidence in the record clearly points to the conclusion that the plaintiff is being punished by loss of her livelihood for her disagreement with the principal's educational philosophy and her expression of such disagreement.[7]

There is a desperate need for stable standards of performance that will withstand judicial scrutiny: (1) required teacher knowledge, competencies, and skills are predetermined; (2) the evaluation system is capable of detecting departures from the standards; and (3) the standards are known to all teachers and opportunity to correct shortcomings is provided.[8] If these could be established, everyone would benefit except clearly incompetent teachers. Administrators would know where to focus their efforts; good teachers would be saved from the annoyance of frivolous charges; and, most importantly, children would be rescued from poor teaching.

Progress toward justiciable performance standards for teachers has recently occurred both in litigation and in research and development on teaching. For example, in litigation a move seems to be under way to focus on definitive criteria of teacher performance as measured by standardized tests. Such efforts have assessed teacher qualities both before teaching and after it has been completed. An example of the former occured recently in Los Angeles where teachers' failure to meet minimum standards of knowledge of their subjects as measured by the National Teachers' Examination was found to be just cause for their discharge.[9] The latter approach focuses not on what the teacher did, in terms of various teaching behaviors, but on students' mastery of the material on standardized tests. This presents a qualitative context into which a court can place the charges of incompetence because normative standards accompany virtually all systematic measures of student progress. Where substantial and persistent departure from them occurs, the logic that the teacher must have had something to do with it can be persuasive.[10]

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[6] Briggs, 282 N.W.2d at 743.

[7] Everett v. Board of Educ., 344 N.W.2d 320 325-26 (Iowa Ct. App. 1983).

[8] J. Beckham, Legal Aspects of Teacher Evaluation (NOLPE Monograph 1981).

More importantly, however, performance standards concentrating on teacher-input factors are beginning to emerge from the research on teaching effectiveness. Unlike the situation of just a few years ago, when virtually everyone despaired of ever finding casual relationships between teacher behaviors and student learning, certain teaching behaviors can now be described and empirically validated as being effective, while their reverse can be similarly described and validated as being ineffective. Thus, abstract performance standards for teachers are beginning to emerge. Though they are in outline form, and suffer the same problems as any static listing of a complex, dynamic process, they do exist and can be used as a profile or taxonomy of effective teaching. Further, their behavioral qualities make them easily presentable as skills that can be taught quite independent of personality, philosophical, and other qualitative predispositions of both teachers and supervisors. For the most part they are, in the jargon of the discipline, *low inference*, rather than *high inference* variables or qualities. In legal terminology, these correspond to the *facts* that are presented as opposed to the *conclusions* derived from them. Though the approach is predicated upon the assumption that discrete teacher behaviors can be isolated that will be applicable across a wide range of teaching contexts, teaching behaviors cannot now and never will be identified that are 100% predictive of teacher success. Instead, the thrust is toward constructing comprehensive lists of effective teaching behaviors which constitute the repertoire from which successful teachers select teaching strategies at any given moment.[11]

Made operational in schools, this means that comprehensive job descriptions can now be drafted which are based on research as well as clearly articulated and logically defensible local values regarding teaching effectiveness. To the extent this is done behaviorally, scientifically, logically, and comprehensively, the lists will obviate the need to formulate *ad hoc* standards when teachers fall into inefficient performance. Instead, the expected standards of performance, which exist prior to the teaching, will provide the criteria for assessment and guides to the improvement of deficient performance. Just as important, the scientific and professional care with which the entries on the list have been formulated strengthens them against the inevitable challenge that the qualities and behaviors listed on teacher rating scales of any kind, no matter how carefully drawn, are about as likely to result in undesirable low student achievement as high.[12] Though there is no gainsaying the fact that *all* teaching is powerfully influenced by the context in which it occurs — grade and ability levels, socio-economic and other family background, and subject-matter — such lists nevertheless contain the key behaviors from which all teachers should draw their instructional strategies. This in no way suggests that alternative teaching methods may not be appropriate at any given moment, but it does provide a "scientific" base on which teachers can successfully create the "art" of their profession.[13]

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[9] United Teachers, Los Angeles v. Los Angeles Unified School Dist. 189 Cal. Rptr. 897 (Cal. Ct. App. 1983).

[10] Sheelhaase v. Woodbury Commun. School Dist., 488 F.2d 237, 245 8th Cir. (1973).

[11] *See* references D and I in Table 1, *supra*, and Hunter, *Teaching Is Decision-Making* 37 Educ. Leadership 1, 62-67 (1979).

Table 1, which was compiled from research as well as field observation and task analyses of teaching in elementary and secondary schools, is such a list. The following definitions apply to the column headings:

(1) BEHAVIOR — a micro-element of teaching, the actual behaviors that are seen or not seen which lead to inferences regarding the efficiency of the teaching being observed;

(2) BASIS FOR CLAIM OF PERFORMANCE VALIDATION — reasonably dependable empirical data or a compelling logical relationship exist which can be cited as evidence that the behavior is associated with teaching effectiveness. The letters entered in the column refer to the various authoritative sources listed at the bottom of the table;

(3) ILLUSTRATIVE COURT DECISIONS — cases that illustrate the importance of a similar factor in establishing — or failing to establish — just cause for a teacher's dismissal. The numbers refer to cases listed in the footnotes.

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[12] Soar, Medley, & Coker, *Teacher Evaluation: A Critique of Currently Used Methods*, Phi Delta Kappan 239, 245 (Dec. 1983).

[13] Gage, *What Do We Know About Teaching Effectiveness?*, Phi Delta Kappan 66, 87-93 (Oct. 1984).

Table I

Performance Standards Which Have Been Found to be Associated with Teacher Effectiveness

	Behavior or Quality	**Basis for Claim of Performance Validation ***	**Illustrative Court Decisions ****
A.	**Instructional or Pedagogical Methods**		
1.	Introducing Lessons	A,B,C,D,F,G,H	17
2.	Establishing a Frame of Reference	A,B,C,D,E,F,G,H	17,22
3.	Varying Instructional Strategies	A,E	16
4.	Using questioning Techniques	A,B,C,D,E,F,G,H	
5.	Direct and Business-like Activities	B,D,E,G,H	28
6.	Responding to Students	A,B,D,G,H	18,22
7.	Ending Lessons	A,K	17
8.	Clarity of Explanations and Directions	A,B,E,F,G,H	17,22,23,26,34
9.	Providing Guided Practice	E,F,I	22,26
10.	Provision for Individual Differences	E,K	23,31,35
11.	Impartial & Objective	E,K	
B.	**Use of Subject-matter**		
1.	Highly Knowledgeable	J	9,21,22,23,24,26
2.	Sequencing of Goals	E,I	16,17,22,26,31
3.	Correspondence with District Guidelines	I,J,K	16,22,28
4.	Accurate Feedback to Students, Including Testing and Evaluation	C,F	23,26,28,34
5.	Provides Opportunities for Student Success	E,I	7,22
6.	Bases Current Lessons on Prior Learning	I	17,22
C.	**Direct Outcomes of Teaching**		
1.	Student Achievement on Material Taught	J,K	10,17,18,28,32
2.	Students Motivated to Learn	B,E,G,H,J,K	7,17,18,22,23,26,31,32

3.	**Postive and Respectful Interaction with Students**	E,I,J,K	7,18,19,28,32,34,35
4.	**Student Decorum:** **a. rules and expectations clearly expressed** **b. absence of distracting disorder** **c. students held accountable for doing their work**	E,I,J,K	5,17,22,26,28,31,34,36
D. Interpersonal & Organizational Relationships			
1.	**Communicates with Parents**	J,K	26,28,32,34
2.	**Fulfills Organizational Responsibilities**	J,K	16,28,31,34
3.	**Maintains Positive Colleague Relationships**	J,K	28,32,33,34
E. Self Renewal			
1.	**Enthusiastic About Teaching & Learning**	E,I,J,K	32
2.	**Keeps Current**	J,K	22,36
3.	**Participates in Upgrading Activities**	K	17,22,23,26,31,35,36

** Letters Refer to References Appended to Table*
*** Numbers Refer to Cases Cited in Footnotes*

References and Other Sources Supporting Claim of Validation

A. Allen, D., and Ryan, K., *Microteaching,* Reading, Mass: Addison-Wesley, 1969.

B. Berliner, D.C. and Tikunoff, W.J., "The California Beginning Teachers' Study," *Journal of Teacher Education,* 1976, 27, 24-30.

C. Fisher, C.W.; Filby, N.N.; Marlaive, R.S.; Cahen, L.S.; Dishaw, M.M.; Moore, J.E.; and Berliner, D.C., *Teaching Behaviors, Academic Learning Time, and Student Achievement: Final Report of Phase III-B Beginning Teacher Evaluation Study.* (San Francisco, Calif: Far West Laboratory for Educational Research and Development, 1978).

D. Gage, N.L., *The Scientific Basis of the Art of Teaching,* New York: Teachers' College Press, 1978.

E. Good, T.L., and Brophy, J.E., *Looking into Classrooms,* (New

York: Harper and Row, 1984) 328-357.

F. Good, T.L., and Grouws, D.A., "Teaching and Mathematics Learning," *Educational Leadership.* 37, 1 October 1979. 39-45.

G. Medley, D., "Teacher Effectiveness," in H.E. Mitzell, (Ed.), *Encyclopedia of Educational Research,* (5th Ed.), New York: The Free Press, 1982, 1894-1903.

H. Rosenshine, B., "Review of Teaching Variables and Student Achievement," in G. Borich, (Ed.), *The Appraisal of Teaching: Concepts and Process,* Reading, Mass: Addison-Wesley, 1977.

I. Squires, D.A.; Huitt, W.G.; and Segars, J.K., *Effective Schools and Classrooms: A Research-Based Perspective* (Washington, D.C.: Association for Supervision and Curriculum Development, 1983).

J. Precedent decisions exist which suggest that this factor is persuasive to courts.

K. Though no empirical validations of this factor exist, compelling logic and conventional values held for teachers make this factor readily defendable as a criterion contributing to teacher effectiveness

Illustrative Cases

Reviewing cases where teachers have been charged with incompetence will suggest the credence of using the standards presented in Table 1 as performance criteria in dismissal proceedings. It must be realized, however, that teacher dismissal rarely rests on a single charge, but rather on multiple charges, such as incompetence and insubordination. According to the *American Law Reports* this pattern results from the courts' tradition that "the incompetent teacher is rarely deficient in one respect alone: rather, incompetence seems to manifest itself in a pervasive pattern encompassing a multitude of sins and bringing in its wake disorganization, dissatisfaction, disharmony, and an atmosphere unproductive for the acquisition of knowledge or any other ancillary benefit."[14] The result is that many school districts attempt to improve their cases by compiling extensive litanies of charges in order to overwhelm the court with evidence sufficient to sustain their action. The following review, therefore, contains cases which illustrate multiple qualities and behaviors, only some of which may be directly related to a teacher's instructional capabilities. Only charges which are demonstrably related to a teacher's instrumental ability or inability to impart knowledge to students will be discussed even though other factors related to fitness to teach might have been part of the case. Valente's listing of the various bases upon which teacher dismissals have been attempted illustrates the breadth of matters which are not part of this review: (1) physical or mental incapacity; (2) physical or mental mistreatment of students; (3) violation of school rules; (4) violation of duty to supervise; (5) lack of cooperation; (6) failure to discipline students; (7) lack of knowledge of the subject; (8) personal misconduct; (9) failure to adapt teaching methods; and (10) negligence.[15] Also, the cases selected for this review are those in which teachers have challenged the justness of charges regarding their competence. Cases where teachers base their claims on constitutional grounds or where teachers are discharged for immorality, criminal activity, or other evidences of unfitness to teach are not reviewed. In sum, the review that follows is representative of particular cases which illustrate instructional competency.

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[14] 4 ALR 3d 1090, at 1102.

Instructional or Pedagogical Skills

Instructional skills have to do with a teacher's ability to present and/or reinforce the body of knowledge that makes up the subject(s) being taught. As identified in Table 1, these skills include presenting information to all students through introducing lessons, using a variety of instructional methods, involving students through teacher-directed questioning, responding to student participation in learning, and bringing lessons to closure through appropriate summarizing and reviewing techniques. A Pennsylvania court affirmed the dismissal of a high school French teacher who could not perform such skills adequately. Through a list of particulars provided by the school board, the court found that the teacher was unable to maintain an adequate pace in presenting the prescribed curriculum, presented information to students in a disorganized fashion, and failed to vary her methods of instruction. Additionally, the board demonstrated that the teacher had been given notice of her deficiencies after having been observed on a number of occasions by five different administrators over a two-year period. It was also shown that the teacher had been provided with a plan for improvement and had in excess of a full school year to implement it. On appeal, the teacher claimed that her dismissal was both procedurally incorrect and was based on insufficient evidence. The court disagreed and affirmed her dismissal, finding itself in agreement with the state's secretary of education:

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[15] W. Valente, Law in the Schools 182 (1980).

> [I]n our opinion, the conduct of the school administration in this case is above reproach. The school district's evaluation procedures are a model of how a professional employee should be rated. The evaluations occurred at two levels. At the first level is the principal; if he rates a professional employee unsatisfactory, the matter is referred to the second level, the superintendent for further evaluation. While a teacher might object to being rated so often in a short period of time by different persons, such a procedure is clearly in the employee's best interest since it brings into the evaluation different viewpoints, thereby lessening the influence personal bias and prejudice with respect to teaching methods can have.[16]

Failure to master the technical skills of teaching also led to the dismissal of a South Dakota high school mathematics teacher. In defending the dismissal before the state's supreme court, the board described the teacher's inability to (1) create an "appropriate" classroom atmosphere, (2) develop student interests and attitudes, and (3) organize and present the subject-matter. Six separate evaluation reports over a three year period found the teacher deficient in organizing instruction. Specific steps were suggested for improvement: review the previous day's lesson, introduce and explain the current day's lesson, summarize the current lesson in relation to students' real-life experiences, and conclude with a brief introduction to the next assignment. In addition, specific suggestions for maintaining classroom order and improving the attitudes of the students were made. Evidence of lack of student learning, along with the teacher's admission that she wilfully refused to try the suggestions presented in her evaluation reports, led the court to comment that the teacher "has consistently demonstrated her inability to effectively teach her students. Six out of seven evaluations made on [her] during the three school years in question criticized her for deficiencies in classroom environment and teaching procedures."[17]

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[16] Rosso v. Board of School Directors, 380 A.2d 1328, 1329 (Pa. Commw. Ct. 1977).
[17] Busker v. Board of Educ., 295 N.W.2d 1, 3-4 (S.D. 1980).

In Iowa, a fifth grade teacher with eleven years of teaching experience challenged her dismissal, contending that the board did not have sufficient evidence to terminate her for lacking necessary skills. In its list of charges, the school administration cited, among other things, "persistent failure to provide the type of teacher-directed responses, activities, and reinforcement techniques for students to make satisfactory progress to acquire basic skills and develop a positive self-concept."[18] The teacher countered by claiming the deficiencies listed did not constitute just cause for dismissal. The court, however, found for the board, affirming its earlier definition of "just cause" in competency proceedings as teacher conduct that

> directly or indirectly, significantly and adversely affects what must be the ultimate goal of every school system: high quality education for the district's students. It relates to job performance including leadership and role model effectiveness. It must include the concept that a school district is not married to mediocrity but may dismiss personnel who are neither performing high quality work nor improving in performance.[19]

After reviewing the evidence presented by the superintendent, the principal, and the director of elementary education, the court concluded that the decision of the trial court had been apt:

> [G]iven the specificity of the charges against [the teacher] together with her apparent failure to improve notwithstanding repeated notices and assistance, the likelihood of recurrences of such incidents, and the significant and adverse psychological and emotional effect such 'negative' conduct has on elementary school children, the greater weight must be accorded the District's evidence.[20]

Use of Subject-Matter

The second area where standards of performance have been recognized by courts relates to teachers' knowledge and handling of their subject-matter. It includes skill in identifying instructional goals, developing objectives which reflect the goals, organizing the objectives into units of instruction, developing individual lesson plans, and measuring and monitoring student progress.

Though many cases over the years have alluded to teacher knowledge in discussing other deficiences, only recently has knowledge of the subject matter been tested directly as a basis for discharge. A California court recently found that teachers'

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[18] Everett, 344 N.W.2d at 320.

[19] *Id* at 321, *citing* Board of Educ. v. Youel, 282 N.W.2d 677 (Iowa 1979).

[20] *Id* at 322.

> failure to pass the examination testing their skills in their subject field of teaching bears directly on their competence as teachers and further that the welfare of the District's students would be affected by the retention of teachers who are unable to demonstrate their competency by successfully passing a competency examination in the field they were engaged to teach.[21]

Lack of ability to plan and prepare for instruction was one of the charges which resulted in the dismissal of a tenured middle school teacher in Louisiana. The action was based on charges derived from the formal observations of four administrators, the principal, the assistant principal, the English consultant, and the personnel director. The deficiencies noted included:

(1) Poor lesson planning;

(2) Inability to get students actively participating in class presentations;

(3) Maintaining improper pace presenting information;

(4) Lack of preparation for instruction;

(5) Inadequate reinforcement of learning;

(6) Failing to give meaningful directions to students;

(7) Improper sequencing of activities during instruction;

(8) Failure to maintain classroom decorum.

As a result of these deficiencies, the teacher was put on a remediation program to help her improve her ability to plan and prepare for instruction. Over the next two years, her ability to organize her classroom performance remained inadequate. Based on the same charges that led to the remediation program, she was then dismissed. In upholding the action, a district court in Louisiana found that, "there was a rational basis for the determination that Mrs. Jones could not adapt to current instructional procedures and that she was incapable of organizing and carrying on a constructive instructional program. Substantial evidence established Mrs. Jones' incompetence and willful neglect of duty."[22]

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[21] United Teachers, 189 Cal. Reptr. at 905.

In a Florida case, lack of skill in planning and preparing for instruction was a predominant cause in the dismissal of an elementary school teacher with twenty-five years of experience. In bringing its charges, the school board contended that the teacher "exhibited inadequate knowledge of subject matter. She has not exhibited good teaching practices in the conduct of her classes. As a direct result of poor planning and poor organization, student motivation has been poor. Her management of students and class discipline has not met acceptable standards."[23] The administrators detailed the charges based on numerous observations by three different supervisors which revealed that she had the following deficiencies:

(1) Failed to use proper grouping techniques;

(2) Students could not understand her explanations due to her inadequate speaking ability;

(3) Used poor grammar in her speech, which her students repeated;

(4) Misspelled words on the chalkboard, which students copied;

(5) Exhibited poor writing techniques, which students copied;

(6) Inadequate understanding of mathematics, phonics, and spelling skills;

(7) Showed inadequate knowledge of proper use of audio-visual equipment and materials;

(8) Did not maintain accurate student progress records;

(9) Had an excessive number of her students placed in low-achievement groups when promoted to the next grade level.[24]

Finding that the teacher was given notice of her deficiencies, was provided with suggestions for improving her ability to organize and present instruction, and was given time to improve, yet largely ignored the administrators' efforts to help her, the court of appeals upheld her discharge, commenting that, "the testimony of Mrs. Blunt's supervisors at the school board hearing with respect to her incompetency was not only substantial, it was devastating."[25]

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[22] Jones v. Jefferson Parish School Bd., 533 F. Supp. 816, 821 (E.D. La. 1982).
[23] Blunt v. Marion County School Bd., 515 F.2d 951, 954 (5th Cir. 1975).
[24] *Id.* at *passim.*

An Illinois elementary school teacher with over twenty-five years of experience was dismissed on a number of grounds, including failure to provide organized classroom instruction, to present clear and understandable directions and explanations, to keep up-to-date records of student progress, and to communicate effectively with parents regarding the progress of her students. Over a period of ten months, in two separate school years, the principal, along with faculty supervisors in the subject areas of reading and language arts, social studies, and science and math observed her classes to assess her performance and identify techniques that would lead to improvement. Though a number of suggestions were formulated, the teacher resisted any change. As a result, she was dismissed. The court concurred, finding that her "deficiencies were fundamental and of long standing having to do with her own mental discipline and her lack of grasp of her subjects."[26]

Direct Outcomes of Teaching

Recent decisions reinforce the proposition that student outcomes may be utilized as surrogate measures of teaching competence. Perhaps the earliest direct use of this definition was in the well-publicized *Scheelhaase* case of a decade ago. Here, an Iowa court found that where the students consistently failed to perform within acceptable ranges on nationally normed examinations of aptitude and achievement, adequate evidence existed to conclude that the teacher was ineffective. In the arguments, little was made of the specific teacher behaviors that ostensibly caused the unsatisfactory outcomes.[27] More recently, in a case which reviewed a range of deficiencies, a teacher in Minnesota was successfully discharged for, among other things, failure of his students to show satisfactory and expected progress. He had been given notice a year prior to his termination that his performance was deficient in the following seven areas:

(1) Inability to develop positive rapport with students;

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[25] *Id.* at 957.

[26] Community Unit School Dist. No. 60 v. Maclin, 435 N.E.2d 845, 851 (Ill. App. Ct. 1982).

[27] Sheelhaase, 488 F.2d 237.

(2) Insufficient communication with parents and fellow staff members;

(3) Inefficient use of class time;

(4) Failure to keep appointments;

(5) Failure to follow the adopted curriculum;

(6) Irrational grading;

(7) Lack of progress of his students.

An appellate court was presented with the deficiencies arranged into four categories: lack of rapport, lack of classroom control, excessive use of worksheets, and lack of student progress.

> [T]he Board's findings regarding a lack of progress by Whaley's students are the most closely related to the statutory grounds for discharge and the most clearly supported by substantial evidence in the record .... [W]e conclude that substantial evidence supports the School Board's findings that Whaley's students made unsatisfactory progress due to his poor teaching performance. When so established, lack of student progress is sufficient to trigger the grounds for discharge under [Minnesota Statutes].[28]

Lack of classroom control, by contrast, has long been recognized as a proper basis for dismissing a teacher. A recent California case where an eighth grade teacher with twenty-one years of experience was observed to have the following problems with her class: "students fighting, playing soccer in the classroom, yelling over the school intercom, yelling out the back door of the classroom, wrestling, throwing pencils, and other disruptive activities."[29] Though the teacher contended that the failure of the district to provide a detailed set of written performance standards defining acceptable classroom decorum invalidated the action, her dismissal was affirmed. The court found that she had received written notice of her deficiencies, recommendations for improvement, offers of assistance, and time to improve. Even though there were, indeed, no written standards of acceptable decorum, the court noted that legislation restricting teacher dismissal to "just cause" did not intend to provide a defense or justification for incompetent teaching. Rather, "the lack of empirical standards applicable to this area of teacher competence mandates that evaluation of teacher performance be left to those with the professional experience and skill to meaningfully assess classroom order."[30]

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[28] Whaley v. Anoka-Hennepin Indep. School Dist. No. 11, 325 N.W.2d 128, 131 (Minn. 1982).

[29] California Teachers' Ass'n, 192 Cal. Reptr. at 360.

A special education teacher in Louisiana was dismissed as the result of multiple charges, among which were failure to establish decorum and provide for individual differences. According to the Court,

> [o]ne of [the teacher's] chief problems was inability to maintain control of the class and obtain and hold the attention of her students. While it is conceded that handling mentally retarded children is difficult, it is also shown that by using proper procedures and techniques, order may be achieved and the attention of students held .... [The teacher] failed to properly plan class lessons to accommodate the requirements of the various students by failing to recognize and provide for differences in ages and learning abilities.[31]

Interpersonal and Organizational Relationships

Ability and willingness to develop and maintain positive relationships with parents, community members, and other staff members appears, from time to time, as a legitimate performance standard in litigation. An Iowa district dismissed a sixth grade teacher for among other things, failing to control his temper, which resulted in poor relationships with both fellow staff members and parents of his students. The court concluded that the "preponderance of the entire evidence indicates he has had continuing problems in dealing with his students, their parents, and the school administration, as well as his teaching methods and lack of self control"[32] In another Iowa district, a teacher was successfully terminated because, among other things, he displayed a "negative attitude toward and [a] poor working relationship with [the] activities director."[33]

Notice of dismissal was sent to a Minnesota high school English teacher with twenty-five years of teaching experience. Among a host of problems noted were that the had poor relations with fellow staff members and had inappropriately discussed personal matters with her students. Though the state supreme court affirmed the validity of the standards used, it reinstated the teacher because the district had not provided a reasonable amount of time for her to correct the problems.[34]

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[30] *Id.* at 363.

[31] Mims v. West Baton Rouge Parish School Bd., 315 So. 2d 349, 352-53 (La. Ct. App. 1975).

[32] Fay v. Board of Directors, 298 N.W.2d 345, 349 (Iowa Ct. App. 1980).

[33] Board of Educ. v. Youel, 282 N.W.2d 677, 682 (Iowa 1979).

Self Renewal

A final area in which performance standards for teachers have been identified relates to on-going professional development. This may be reflected in their overall enthusiasm for their work as well in maintaining their knowledge and skill levels. A first grade teacher in South Dakota with seventeen years of teaching experience was dismissed because she refused to try new teaching methods or different techniques in order to correct deficiencies in providing for the individual needs of her students.[35] In the latter case, the court was persuaded that "there was a lack of any reasonable response to the recommendations."[37]

Conclusion

Certain patterns emerge from analyzing court reviews of teacher dismissals for incompetence. They include the following:

(1) Successful establishment of incompetence is the result of a pattern of behavior that develops over time rather than the result of a single incident or shortcoming;

(2) Deficiencies must be determined by first-hand observation:

(3) Notice of specific deficiencies must be provided the teacher, along with suggestions for improvement;

(4) Reasonable time for improvement must be allowed;

(5) Follow-up evaluation must be done in order to assess whether or not improvement has occurred.

More important, however, is that the performance standards cited by successful districts were not merely the product of an administrator's conventional wisdom or personal preferences regarding effective teaching. Sustained cases abandoned that tradition and in its place established relatively stable criteria that appeared to be independent of the context where they were used. Though none of the cases openly cited research on teaching and/or learning there is no reason why they could or should not have done so. Empirically and logically derived performance standards such as those listed in Table 1 could do much to strengthen the board's charges when dismissal is necessary. The most fair and most effective way to evaluate a teacher is to view evaluation as a cycle of events that begins with providing employees comprehensive, stable, and valid performance standards. These standards also can be used to assess the work done, to provide corrective action, and to determine whether improvement has occurred. It is now possible to take the first, and most crucial step. Until that is done a legally and morally justifiable evaluation cycle can never be completed.

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[34] Ganyo v. Independent School Dist. No. 832, 311 N.W.2d 497 (Minn. 1981).

[35] Mortweet v. Ethan Bd. of Educ., 241 N.W. 2d 580 (1976).

[36] Board of Directors v. Mroz, 295 N.W.2d 447 (Iowa 1980); Laws v. Richland County School Dist., 243 S.E.2nd 192 (S.C. 1978)

[37] Laws, 243 S.E.2d at 194.

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Title IX: Current Judicial, Legislative, and Administrative Activity

Gail Paulus Sorenson

Nearly ten months after the Supreme Court decided the case of *Grove City College v. Bell,*[1] at least three things are clear: federal regulation and enforcement activities designed to eliminate discrimination based on sex are triggered by indirect federal aid and are program specific; the proposed Civil Rights Act of 1984,[2] which was intended to reaffirm broad coverage under civil rights statutes, was not passed by the 98th Congress; and at least twenty-two sex discrimination cases under investigation by the Department of Education's Office for Civil Rights in early 1984 have been dropped for lack of jurisdiction. Looking to the future, it can be predicted with some certainty that the present administration will continue to oppose broad-based institutional coverage for anti-discrimination provisions; that federal legislators will consider a new civil rights measure when the 99th Congress convenes; and that the Office for Civil Rights will proceed cautiously pending congressional clarification of intent and would reopen closed cases if the Supreme Court's program specific conclusions were legislatively reversed.

The Grove City Case

The Supreme Court decision in the *Grove City* case terminated a six-year legal dispute between the department of education and Grove City College, a small, private, liberal arts college in Pennsylvania. Discrimination was not at issue in the case but rather whether or not the receipt of federal grants by the students of Grove City College subjected the college itself to the technical requirement that it file an assurance-of-compliance form. Such a form would signify that the college would not discriminate on the basis of sex in programs or activities (however defined) that received federal financial assistance. The major issue in contention, as far as the litigants were concerned, was whether or not the institution could be said to be a "recipient" of federal assistance (and thus subject to the assurance of compliance provisions) merely because some of its students received federal grants to aid them in obtaining a college education.[3]

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[1] Grove City College v. Bell, 104 S. Ct. 1211 (1984) (multiple references will be limited throughout).

[2] H.R. 5490, 98th Cong., 2d Sess. (1984). *See also* S. 2568, 98th Cong., 2d Sess. (1984).

In deciding the major issue, all members of the Court rejected the distinction between direct and indirect aid sought by Grove City College and concluded that federal law did not suggest that

> Congress elevated form over substance by making the application of the nondiscrimination principle dependent on the manner in which a program or activity receives federal assistance. There is no basis in the statute for the view that only institutions that themselves apply for federal aid or receive checks directly from the federal government are subject to regulation.[4]

This conclusion was derived from title IX's "all inclusive" language, which on its face was not limited to direct institutional aid;[5] from the fact that the economic effect of direct and indirect assistance often is indistinguishable;[6] from the fact that student financial assistance was intended by Congress to aid educational institutions themselves;[7] and from an analysis of the legislative history and subsequent treatment of title IX by Congress.[8] The result, which clearly subjects recipients of indirect aid to at least limited federal regulatory authority, has potentially far-reaching consequences that appear to be only dimly perceived at the present time.

On another issue, and despite the fact that by the time the *Grove City* case reached the Supreme Court, both the department of education and Grove City College were of the opinion that federal regulatory authority reached only the particular programs or activities receiving assistance, the Court proceeded to examine whether or not the scope of coverage (and by implication enforcement) extended to the institution as a whole or only to Grove City's financial aid program. Justice Stevens, in a concurring and dissenting opinion, declined to consider this issue, believing that to do so would be to render an advisory opinion "predicated on speculation rather than evidence."[9]

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[3] Student loans that are only *guaranteed* by the federal government are specifically exempted from Title IX coverage. Grove City College v. Bell, 687 F.2d 684, 690, n.10 (3d Cir. 1982).

[4] Grove City, 104 S. Ct. at 1217 (citations omitted).

[5] *Id.* at 1217.

[6] *Id.*

[7] *Id.* at 1218.

[8] *Id.* at 1219.

In a conclusion surprisingly inconsistent with the Court's previous rejection of the direct/indirect dichotomy vis-a-vis the recipient status of the college, a majority concluded that "the fact that federal funds eventually reach the college's general operating budget cannot subject Grove City to institution-wide coverage."[10] With little indication of how congressional intent was determined, the Court stated that it had "found no persuasive evidence suggesting that Congress intended that . . . regulatory authority follow federally aided students from classroom to classroom, building to building, or activity to activity."[11]

The Supreme Court's opinion in *Grove City*, which has been called "grotesque" by one scholar[12] and "absurd" by Justices Brennan and Marshall,[13] appears, at best, to be internally irreconsilable. For those who have become accustomed to the Court's reasoning in establishment clause cases, that aid given to students cannot be said impermissibly to aid sectarian institutions,[14] it would not have appeared unusual if the Court had simply ruled that Grove City did not receive federal funds within the meaning of title IX. Supporting justification for such a conclusion would have been consistent with that needed to justify the subsequent program-specific interpretation, and the resulting harmonious judgment would have been no more controversial than the one actually reached, which seems to have satisfied no one (with the possible exception of the department of education). Grove City College is justifiably concerned that such indirect forms of federal financial assistance would subject it to administrative burdens that are inconsistent with its educational philosophy and mission. On the other hand, there is substantial congressional support for going beyond the Court's holding by legislatively asserting that the non-discrimination provisions of title IX were intended to apply institution-wide. Among scholars and the general public, there are those who are ready to embrace the above dissatisfactions but few who applaud the Court's decision.

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[9] *Id.* at 1225 (Stevens, J., concurring and dissenting).

[10] *Id.* at 1221.

[11] *Id.* at 1222.

[12] Valente, *Title IX, Grove City College, and the Art of the Grotesque,* 17 West's Educ. L. Rptr. 1, 7 (1984).

[13] Grove City, 104 S. Ct. at 1236 (Brennan, J., concurring and dissenting).

[14] *See, e.g.,* Everson v. Board of Educ., 330 U.S. 1 (1947); Board of Educ. v. Allen, 292 U.S. 236 (1968); Wolman v. Walter, 433 U.S. 229 (1977); Mueller v. Allen, 103 S. Ct. 3062 (1983).

Judicial and Legislative Effects of the Grove City Case

The most immediate effect of the Supreme Court's program-specific conclusion was that it was applied, the same day that *Grove City* was decided, to federal statutory language that limits discrimination against the handicapped.[15] Citing the *Grove City* case, the Court stated that "Section 504 [of the Rehabilitation Act of 1973], by its terms, prohibits discrimination only by a 'program or activity receiving Federal financial assistance.' Clearly, this language limits the ban on discrimination to the specific program that receives federal funds."[16]

Harry M. Singleton, the Department of Education's Assistant Secretary for Civil Rights, informed the ten regional civil rights directors that "there is no doubt that the Court's decision [in *Grove City*] is applicable to OCR's other statutory authorities which include the phrase 'program or activity receiving Federal financial assistance' .... [T]he *Grove City* decision applies to the jurisdictional scope of Title VI, Section 504, and the Age Discrimination Act, as well as Title IX."[17] Therefore, *Grove City's* effects extend to actual or potential discrimination on the basis of "race, color, or national origin" under title VI,[18] to discrimination against "otherwise qualified handicapped individuals" under section 504,[19] to discrimination on the basis of age under the Age Discrimination Act of 1975,[20] and to sex discrimination — "a quadruple play against civil rights," as Senator Edward M. Kennedy called it.[21] It was this extended effect on all statutes patterned after title VI (1964) that was widely predicted and that no doubt led to immediate congressional efforts to mitigate the effect of the Court's program-specific interpretation in *Grove City.*

The proposed Civil Rights Act of 1984 was introduced in the House of Representatives on April 12, 1984, by seventy-two House members (with additional initial sponsorship from 107 members of Congress)[22] and was referred jointly to the Committees on Education and Labor and the Judiciary. A little more than two months later, the bill was passed by the House, by a vote of 375-32[23] and was immediately referred to the Senate for action. Although an identical Senate bill (S. 2568)[24] had 56 Senate supporters, it never reached the floor. Principal opposition to the measure came from Senator Orrin G. Hatch of Utah, who chaired the Senate Labor and Human Resources Committee to which the Senate version had been referred.

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[15] Consolidated Rail Corp. v. Darrone, 104 S. Ct. 1248 (1984).

[16] *Id.* at 1255.

[17] H. Singleton, Analysis of the Decision in *Grove City College* v. *Bell* and Initial Guidance on its Application to OCR Enforcement Activities 6 (July 31, 1984) (available from the Office for Civil Rights, Department of Education).

[18] Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1982).

[19] Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982).

[20] Age Discrimination act of 1975, 42 U.S.C. § 1601 (1982).

[21] Quoted in Educ. Daily, Apr. 13, 1984, at 2.

[22] H.R. 5490, 98th Cong., 2d Sess. (1984).

Despite widespread support for the House-passed civil rights bill, it remained controversial throughout the second session of Congress, and was ultimately withdrawn in the Senate on October 2, 1984, shortly before the 98th Congress adjourned.[25] Senator Edward M. Kennedy of Massachusetts who, along with Senator Robert Packwood of Oregon, had strongly supported the civil rights initiative, was reported to have chastised the Senate after the civil rights bill was withdrawn fron consideration: "Shame on the Senate. Shame on the Senate. We are being asked to sweep under the rug a basic and fundamental issue: whether Federal taxpayers' funds should be used by programs that discriminate against the handicapped, minorities and the aged."[26] And despite Senator Packwood's promise to reintroduce the legislation in the next session of Congress, it was the opinion of Senator Daniel Patrick Moynihan that "[t]his bill will not pass while the present majority of this chamber is in place. We have learned to the shock of this country that we do not have a majority for the Civil Rights Act of 1964."[27]

The provisions of H.R. 5490, the proposed Civil Rights Act of 1984, are worth considering in some detail in order to clarify what the act sought to legislate and to identify the major sources of controversy. The purpose of the legislation, according to House committee reports, was "to reaffirm pre-Grove City College judicial and executive branch interpretations and enforcement practices which provided for broad coverage of [the] . . . antidiscrimination provisions."[28] It would have amended the four major civil rights statutes affected by the *Grove City* case by deleting the "program or activity" language of each statute and adding the term "recipient." Thus, title IX would have read, for example: "No person in the United States shall, on the basis of sex, be excluded from participation, be denied benefits, or be subjected to discrimination by any education recipient of Federal financial assistance . . . . "[29]

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[23] Cohodas, *Groups Push for Senate Action on Civil Rights Legislation,* 42 Cong. Q. Weekly Rpt. 2187 (1984).

[24] S. 2568, 98th Cong., 2d Sess. (1984).

[25] For an interesting account of attempts to pass the measure in the Senate by attaching it to a general appropriations bill, and subsequent attempts to defeat the bill by attaching controversial amendments on busing, gun control, and tuition tax credits, see articles by Nadine Cohodas in 42 Cong. Q. Weekly Rpt, at 2430-2433 (1984).

[26] New York Times, Oct. 3, 1984, at Al, col. 3.

[27] *Id.* at A20, col. 3.

[28] H.R. Rpt. 98-892, Parts 1 & 2, 98th Cong., 2d Sess. (1984).

A second change would have been the addition of the following definition of "recipient":

> For the purpose of this title, the term "recipient" means — (A) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and (B) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit, to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits.[30]

The final major change would have deleted the word "program" while simultaneously retaining the "pinpointing" concept of the fund termination provisions. Fund termination thus would have been "limited to the particular political entity, or part thereof, or other recipient" determined to be in non-compliance and would have been "limited in its effect to the particular assistance which supports such noncompliance so found . . . . "[31]

Although it is clear from the above pinpointing language that the measure was not intended to allow for institution-wide fund terminations when noncompliance by a recipient or part thereof was documented, critics were concerned about the word "supports." It could be argued that a federally funded financial aid program, for example, supports discrimination in other college programs, i.e., that it has "economic ripple effects." Indeed, the Supreme Court, in *Grove City,* said that "[m]ost federal educational assistance has economic ripple effects throughout the aided institution, and it would be difficult, if not impossible, to determine which programs or activities derive such indirect benefits."[32] Just as the Court rejected this indirect ripple effect, so did the opponents of the 1984 civil rights measures.

The Department of Justice's Assistant Attorney General, William Bradford Reynolds, criticized the fund termination provisions of the proposed legislation for failure to define adequately the term "supports." It was his belief that the term was sufficiently ambiguous to allow fund terminations in programs that were not discriminatory but which served as a conduit for providing indirect assistance to a discriminatory program.[33]

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[29] *Id.* at 40.
[30] *Id.* at 30.
[31] *Id.* at 41.
[32] Grove City, 104 S. Ct. at 1211.

It seems apparent from congressional documents that this was, indeed, the intent of proposed funding provisions, but that such an intent was *not* considered to have been a change from prior practice and that support would have to be proven in each case — resulting in fund terminations affecting some non-funded programs but not others.[34] Members of the House committees who considered the civil rights bill argued that enforcement practices had been modeled on the leading case involving fund termination and that there had been no intent to modify prior practices. In *Board of Public Instruction v. Finch,* the Court of Appeals for the Fifth Circuit had said, in 1969, that the termination of federal funding was appropriate only "[i]f the funds provided by the grant are administered in a discriminatory manner, or if they support a program which is infected by a discriminatory environment . . . ."[35]

David Tatel, who headed the Office of Civil Rights from 1977 to 1979, argued that the revised funding termination provision would not inevitably lead to terminations in non-discriminatory funded programs. "[F]ederal funding to an undergraduate program could not be terminated if discrimination were found in a non-funded graduate program, *unless* the government could prove that federal money *actually benefited* the graduate program."[36] However, as previously suggested, the result envisioned by Reynolds could have materialized if discrimination were found in non-funded programs that received indirect support from financial aid monies, for example, that reached the general operating budget — even though no discrimination existed in the financial aid program itself. If funds "supported" programs "infected by a discriminatory environment," they could have been withdrawn. It thus appears that Reynolds' objections to the proposed funding termination provision may have been related as much to anticipated substantive results as to ambiguous language, though supporters continued to assert that results would not be inconsistent with prior practice.

Additional criticism of the proposed legislation was advanced by

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[33] N. Cohodas, *Battle Shaping Up in Senate over Rights Bill,* 42 Cong. Q. Weekly Rpt. 1365, 1367 (1984).

[34] *See supra* note 28 at 15.

[35] 414 F.2d 1068, 1078 (5th Cir. 1969).

[36] Testimony of D. Tatel. *See supra* note 33 at 1367 (emphasis added).

Reynolds; Secretary of Education Terrel Bell; and Harry Singleton, Assistant Secretary of Education for Civil Rights, and was aimed at Congress' reassertion of the broad reach of general anti-discrimination provisions.[37] These critics were concerned that the general anti-discrimination provisions of the civil rights measures would be extended far more broadly under the proposed legislation than they had been previously. Typical examples of what Reynolds labeled the "trickle up" theory of coverage included an extension of the non-discrimination principle to all campuses of a multi-campus university when only one campus or individual program received federal aid and a similar extension to all state agencies if one state agency or local agency received funds.[38] Examples of the "trickle down" theory of coverage included a state's receipt of a federal block grant for education extending the non-discrimination principle to all of the state's political subdivisions.[39]

Members of Congress considering the civil rights legislation stated that while such expanded coverage could occur in certain circumstances, it would not be automatic. The "trickle down" theory of coverage elicited the following rebuttal:

> A recipient is covered in its entirety, including its subunits. Political subdivisions (such as cities) are legal entities unto themselves and should not be treated as subunits of their States. Thus, the receipt by a State of federal funds would not necessarily lead to the coverage of all political subdivisions, but it would lead to coverage of all State agencies and departments. A political subdivision must itself receive assistance in order to be covered. This may happen through the direct receipt of federal funds, or through the receipt of federal funds from a State or other recipient, but it is not the automatic result of a State's coverage.[40]

Neither was automatic state coverage to be assumed, under the "trickle up" theory, when a subunit or subdivision received federal funds:

> If a subunit of a State or political subdivision is the recipient,

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[37] *See supra* notes 28 & 33. *See also* T.H. Bell, Statement of T.H. Bell, Secretary Department of Education, Before the Committee on the Judiciary, Subcommittee on Constitution, United States Senate Concerning S.2568 — "Civil Rights Act of 1984" (June 5, 1984) (available from the Department of Education).

[38] *See generally id.* The "trickle down" theory of coverage under the proposed civil rights measures was put forth by Reynolds, Bell, and Singleton on several occasions.

[39] *See, e.g.*, Bell, *supra note* 37 at 3.

[40] *Supra note* 28 at 26.

> such as a state department of health or a city fire department, coverage of the parent entity and all of its operations is not automatic. A subunit's receipt of federal financial assistance will trigger coverage for the parent entity of which it is a part, *if* the assistance to the subunit supports the larger entity as well .... So, for example, administrative overhead from federal assistance which a subunit gives to its parent entity will "support" the larger entity and thus lead to coverage.[41]

The general intent of proposed changes related to coverage was to "reaffirm" the broad applicability of the anti-discrimination provisions of the four relevant civil rights statutes — "to clarify that agency and judicial interpretations of this legislation should be guided by the concept of broad rather than narrow application .... "[42]

A more basic criticism of the proposed legislation which, in effect, is a criticism of present legislation as well, as interpreted in the *Grove City* case, is that *indirect* aid to a recipient should not trigger the general anti-discrimination provisions of the civil rights statutes. George Roche, President of Hillsdale College, reflected the position of officials at Grove City College and other institutions when he said that his college would not admit students who received federal education grants. He indicated that signing a required assurance-of-compliance form under the statutes and accompanying regulations is "in effect a blank search warrant authorizing widespread bureaucratic intrusion into our records and decision-making processes, an obligation for Hillsdale to be considered guilty until proven innocent."[43] President Charles S. MacKenzie of Grove City College, an institution that had always believed discrimination to be "morally repugnant," nevertheless felt that the "deeply held ideals of autonomy and self-sufficiency" were threatened by federal intervention and regulation.[44]

While this latter criticism has found support among some members of Congress,[45] it appears that questions related to the breadth of coverage under anti-discrimination provisions and the scope of funding termination provisions are more likely to occupy members of Congress if legislation similar to the Civil Rights Act of 1984 is introduced in 1985.

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[41] *Id.*

[42] *Id.*

[43] *Id.* at 8.

[44] N. Cohodas, *Grove City College: Uneasy in the Limelight,* 42 Cong. Q. Weekly Rpt. 1367 (1984).

[45] *See, e.g., supra* note 28 at 48.

The Effects of Grove City on Administrative Enforcement

It is apparent from the fact that cases under investigation in 1984 by the Department of Education's Office for Civil Rights were closed, interrupted, or modified so that the jurisdictional scope of the civil rights statutes has been narrowed as a direct result of the Supreme Court's decision in the *Grove City* case. The conclusion follows that the education department had previously interpreted the scope of its jurisdiction with regard to the investigation of discrimination more broadly than is currently permissible.

The first indication of the restricted scope of enforcement activity came with the announcement by the Office for Civil Rights that it had declined to pursue action against the University of Maryland at College Park despite the fact that the office had found sex discrimination in the college athletic program.[46] Shortly thereafter, Secretary of Education Terrel Bell reported that the Department had closed eighteen cases where sex discrimination had been alleged or demonstrated at the collegiate level and four cases at the elementary and secondary school level.[47] Testifying before the House Committees on Education and Labor and the Judiciary, Mary F. Berry, member of the United States Commission on Civil Rights, reported that an additional six compliance reviews had been narrowed, eighteen reviews and five investigations had been interrupted, and nine precollegiate and forty-six collegiate cases were being reviewed.[48] With regard to discrimination on the basis of handicap, Berry reported that five cases and one compliance review had been narrowed and that seven cases were being reviewed: with regard to discrimination on the basis of race, color, or national origin, five cases had been modified.[49] Berry concluded her testimony by stating that "it is absolutely incomprehensible that Federal taxpayers' funds should be used in ways to prevent some of the taxpayers because of their age, race, sex, or solely because of a handicapping condition from having an equal opportunity to use what we all finance."[50]

Although the cases that were dropped dealt with a variety of types of discrimination, those involving potential or actual sex discrimination were related to admissions, student services, student support services,[51] athletics, and employment bias, with the majority related to alleged discrimination in intercollegiate athletic programs.[52] One or more complaints of alleged sex discrimination in athletic programs were reportedly dropped at Auburn University, Centralia College, Duke University, Gonzaga University, Idaho State University, Miami University of Ohio, the College of Southern Idaho, and the University of Washington.[53]

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[46] The Chronicle of Higher Educ., Mar. 21, 1984, at 1, col. 4.
[47] School L. News, June 1, 1984, at 9.
[48] *Supra* note 28 at 7.
[49] *Id.*
[50] *Id.* at 7-8.
[51] *Id.* at 7.

By July 31, 1984, the Assistant Secretary for Civil Rights, Harry M. Singleton, had issued initial guidance on the application of the principles derived from the *Grove City* case to enforcement activities conducted by the Office for Civil Rights (OCR).[54] Regional directors were first advised to "take no action restricting investigations ... when a question remains as to jurisdiction which is not addressed in this memorandum."[55] Deriving guidance from the *Grove City* case, the memorandum treated the issue of whether the federal aid is earmarked or nonearmarked. "If the funding is nonearmarked, jurisdiction may be asserted recipient-wide. If the funding is earmarked, jurisdiction may only be asserted over the program [including all of its activities] of the recipient receiving the earmarked funds .... "[56]

In analyzing various sources of federal aid to pre-collegiate education, OCR has concluded that all programs or activities of a local educational agency (LEA) receiving federal impact aid are subject to the jurisdiction of the OCR.[57] Thus these funds are nonearmarked, unlike funds for vocational education, education of the handicapped, and compensatory education, which are earmarked for specific purposes.[58] OCR jurisdiction, however, will extend to all aspects of these programs regardless of whether federal funding permeates the program. With regard to those LEAs that receive federal block grant appropriations, OCR has determined that there is a "presumption that all of an LEA's programs and activities" will be subject to official scrutiny.[59] Apart from federal impact aid, which is received by relatively few school districts, it appears clear that receipt of block grant funds will trigger broad-based jurisdiction that will extend to all aspects of public education, including those public educational programs that are provided for children attending private institutions as well.

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[52] The Chronicle of Higher Educ., June 13, 1984, at 18.
[53] *Id.* at 9.
[54] *Supra* note 17.
[55] *Id.* at 1.
[56] *Id.* at 6.
[57] *Id.* at 7.
[58] *Id.*
[59] *Id.* at 8.

The jurisdictional authority of OCR in higher education will be substantially less broad than the corresponding authority at the precollegiate level. Student financial assistance, including work study funds, will subject the financial aid office to regulation pursuant to the *Grove City* case; facilities constructed or renovated with federal financial assistance will bring all programs which use the facilities within OCR's jurisdiction; and grants flowing to a particular department or program will subject all activities, including those receiving no federal financial assistance, to the anti-bias provisions of federal law.[60]

The Office of Civil Rights is continuing to assert *institution-wide* jurisdiction when it receives complaints regarding discrimination in admissions and recruitment in federally aided institutions, even when those particular programs do not receive federal funds.[61] This appears to be a curious application of *Grove City* principles. Although it is certainly true that "[o]ne who is discriminated against in seeking admission is denied access to all educational programs and activities within an institution,"[62] which could be said to implicate any program receiving federal financial assistance, it is still an apparently unjustified extension to assert *institution-wide* jurisdiction. That the end result may be logical, on the theory that "the entire body of programs within the school is tainted,"[63] does not make it consistent with the program specific limitation of *Grove City*. The Supreme Court concluded, it will be remembered, that "the receipt of [federal grants] by some of Grove City's students does not trigger institution-wide coverage under [federal law]. In purpose and effect, [federal grants] represent federal financial assistance to the College's own financial aid program, and it is that program that may properly be regulated . . . . "[64] If the *sine qua non* of federal regulation is the receipt of federal dollars, it would appear to be a retreat from *Grove City* to extend jurisdiction beyond those programs that actually receive federal assistance and indirectly engage in discrimination through their "agents" in admissions and recruitment programs. This issue, along with the possible extension of OCR jurisdiction to those college and university programs where work-study students are actually employed, should be closely followed as OCR refines its jurisdictional authority over the next few months.

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[60] *Id.* at 9.

[61] *Id.*

[62] Rice v. President and Fellows of Harvard College, 663 F.2d 336, 339 n.2 (1st Cir. 1981).

[63] *Id.*

[64] Grove City, 104 S. Ct. 1222.

Conclusion

Charles S. MacKenzie, the president of Grove City College, has argued that the college's present refusal to accept students who receive federal financial assistance was essential to maintain the "autonomy and independence" of the institution.[65] He has expressed his fear that, even with such a drastic step, the college may not be able to disengage itself from federal governmental control and that "any meaningful distinction between private and public education will be lost."[66] While it may be relatively easy to sympathize with MacKenzie, particularly when it is clear that Grove City College has had a long-standing tradition of non-discrimination, one has to wonder if sympathy would extend to an institution that had actually engaged in pervasive discrimination.

Although it is unlikely that federal legislation will seek to reverse the Supreme Court's determination that indirect federal financial assistance will invoke federal regulatory authority, it is certain that there are problems to be resolved before any civil rights legislation clarifying congressional intention with regard to the principle of non-discrimination will pass both houses of Congress. At the moment one can only await further judicial and administrative directives and the promise by House Speaker Thomas P. O'Neill that civil rights legislation patterned after the withdrawn Civil Rights Act of 1984 will be introduced in the 99th Congress — designated H.R. 1, to "symbolize its importance."[67]

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[65] The Chronicle of Higher Educ., June 6, 1984, at 16.
[66] *Id.* at 13.
[67] *Id.*, Oct. 10, 1984, at 1.

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Legal Challenges to Compulsory Attendance Laws

Joseph C. Beckham

The United States Supreme Court has held that education is not a fundamental constitutional right, although it is an important interest which, if denied, may receive "heightened" review by a federal court.[1] Education, while not an express right under the federal constitution, is mandated under state constitutional provisions designed to insure a system of public schools. Compulsory attendance laws reflect the state's mandate to insure educational opportunity and provide for this important interest.

The state's responsibility to insure quality education can be deduced from state constitutional mandate and statutory enactment. In most jurisdictions, constitutional provisions, statutory law and regulatory standards may be coupled with judicial pronouncements to confirm a compelling state interest in the implementation of compulsory attendance laws. The extension of these laws to permit state regulation of private schools has been acknowledged by federal courts.[2]

The United States Supreme Court recognized and articulated those legitimate state interests in the education of children which are the source of compulsory attendance requirements.[3] The court noted that education prepares the individual for effective and intelligent participation in an open, democratic political system and enables the citizen to be a self-sufficient and self-reliant member of society.[4] Furthermore, the state has a legitimate interest in seeking "to develop the latent talents of its children," preparing them "for the life style that they may later choose."[5] Periodic challenges to the state's authority to require compulsory attendance have focused on the parent or nonpublic school's interest in determining what constitutes an adequate education. Parents have asserted a right to provide home instruction as an alternative to public schools. Private institutions, often with the support of parent groups, have challenged the state's authority to regulate nonpublic institutions. In these instances, courts have been compelled to balance competing state and private interests in order to delineate the scope of compulsory attendance requirements.[6]

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[1] *See* Plyler v. Doe, 457 U.S. 202 (1982), and San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

[2] *See, e.g.,* Lemon v. Kurtzman, 403 U.S. 602 (1971); Board of Educ. v. Allen, 392 U.S. 236 (1968); and Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[3] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[4] *Id.* at 221.

[5] *Id.* at 240 (concurring opinion of Justice White, joined by Justice Brennan and Justice Stewart).

Legal challenges to state compulsory attendance laws have emphasized four interrelated constitutional claims. Under provisions of the free exercise clause of the first amendment, parents have challenged the state's authority to require public school attendance in lieu of home instruction and private, religious organizations have refused to comply with state regulation of nonpublic schools. Alternatively, parents and religious organizations have asserted violations of the establishment clause of the first amendment in attacking state regulation of private, religious school operations. In those cases in which state compulsory attendance requirements impose criminal penalties for nonconformance, challenges based upon a denial of fifth and fourteenth amendment due process have been addressed. Finally, parents have asserted a right to direct the education of the child under various constitutional theories implicating privacy, equal protection, and due process guarantees.

Free Exercise

The first amendment has been interpreted to prohibit states from passing laws which deny free exercise of religion. Initially, the party alleging a violation of the free exercise clause must establish that the objection to state action is rooted in genuine religious doctrine or belief and that the state action imposes a burden on the exercise of that belief. Courts will carefully assess whether a claim based upon free exercise of religion can be characterized as predicated upon religious belief and will consider both the intent and the application of the state law in determining whether there is an undue burden, direct or indirect, on free exercise.[7]

In *Wisconsin v. Yoder*,[8] the United States Supreme Court considered the religious beliefs of Amish parents who were convicted of violating Wisconsin's compulsory school attendance law by refusing to send their children to public or private school beyond the eighth grade. The High Court reversed the convictions after giving close scrutiny to the religious beliefs and unique society, founded upon religious doctrine, which prevailed among the Amish. After recognizing that the Amish way of life was deeply rooted in an historical and religious tradition which was contrary to the "wordly," "intellectual," and "competitive" nature of schooling at the secondary school level, the Court balanced the state's interest in compulsory education against the sincere religious beliefs of the Amish.

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[6] M. McCarthy & P. Deignan, What Legally Constitutes an Adequate Public Education? 29-33 (1982).

[7] *See* Abington Township v. Schempp, 374 U.S. 203 (1963); Sherbert v. Verner, 374 U.S. 398 (1963); and Gitlow v. New York, 268 U.S. 652 (1925).

[8] 406 U.S. 205 (1972).

Given the unique facts and circumstances associated with the Amish, the Court held that Wisconsin's interest in compulsory education beyond the eighth grade was not so compelling as to override the free exercise of a sincerely held religious belief. A primary factor which influenced the Court was the recognition that Amish children received formal public education through the eighth grade and then obtained informal vocational training to enable them to assimilate into a self-contained, self-sufficient religious and social community with a long history as a successful segment of American society.[9]

The Fourth Circuit Court of Appeals applied two aspects of the *Yoder* rationale in determining whether a North Carolina parent's religious beliefs justified his refusal to comply with state compulsory attendance laws. In determining the extent to which the North Carolina parent's religious beliefs compared with those espoused by the Amish, the court distinguished the parent's refusal to enroll his children in any public or nonpublic school for any length of time and questioned the parent's expectation that the children would be fully integrated into modern society at age eighteen.

In addition, the court found that North Carolina's interest in compulsory education was of sufficient magnitude to override the interest claimed by the parent under the free exercise clause of the first amendment. Basing its decision on a review of North Carolina statutes requiring public and nonpublic schools to meet administration and reporting requirements for competency testing, attendance, disease immunization, and health and safety regulations, the court concluded that North Carolina had not abdicated its interest in the quality of education received by students in nonpublic schools and had maintained a compelling interest in compulsory education for the children of the state.[10]

In rejecting a parent's request for declaratory and injunctive relief which would permit him to educate his children in the home, the

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[9] *Id.*

[10] Duro v. District Attorney, 712 F.2d 96 (4th Cir. 1983).

North Carolina Court of Appeals has held that home instruction would not meet statutory qualifications as a nonpublic school. The North Carolina law requiring compulsory attendance defined "schools" to include "all public schools and such nonpublic schools as have teachers and curricula that are approved by the State Board of Education."[11] The court concluded that "school" meant an educational institution and did not include home instruction.

Even assuming that the parent had a protected religious belief which was infringed by the state compulsory attendance law, the court found that the state had an overriding interest in assuring that the children were educated in a school. Noting that the state had no means to insure that children who are at home are receiving an education, the court held that the state's interest in compulsory education outweighed the parent's interest in providing education at home.[12]

A Nebraska parent sought to educate his two children, ages seven and sixteen, at home. Pertinent state statutes required that schools meet certain standards in order to operate, including state inspection and approval of public and private schools. In a previous criminal action, Morrow was acquitted of a charge of violating state compulsory attendance laws. Since Morrow did not possess state certification, a requisite to the operation of a private school in Nebraska, the state successfully enjoined him from operating a private school for the education of his children. In its opinion, the Nebraska Supreme Court concluded that Morrow's sincerely held religious beliefs would not justify a refusal to comply with Nebraska's education law, since the state had a compelling interest in the education of Morrow's children that outweighed his right of free exercise.[13]

A large body of case law confirms the state's authority to compel private schools to meet state compulsory attendance law standards. Requirements that private institutions hire teachers with specified training, offer prescribed subjects, and privide minimum hours of instruction have been recognized in many jurisdictions. Nebraska's Supreme Court recognized that state's critical interest in the provision of education and upheld reporting and curricular requirements for religious schools.[14] North Dakota's highest court has ruled that a private religious school's compliance with state uniform course mandates is not so burdensome as to unduly restrict free exercise.[15]

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[11] N.C. Gen. Stat. § 115C-378.

[12] Delconte v. State, 308 S.E.2d 898 (N.C. App. 1983).

[13] State of Nebraska *ex rel.* Douglas v. Morrow, 343 N.W.2d 903 (Neb. 1984).

[14] State *ex rel.* Douglas v. Faith Baptist Church, 207 Neb. 802, 301 N.W.2d 571 (1981), ***appeal dismissed,*** 454 U.S. 803 (1981).

[15] State v. Shaver, 294 N.W.2d 883 (N.D. 1980).

The Michigan Department of Education appealed from a trial court's finding that Michigan laws requiring certification of teachers in nonpublic schools and mandating certain courses and curricular standards in such schools violated the first amendment's provision on free exercise of religion. The state's compulsory education statutes allowed for a child to meet requirements by attending "a state approved nonpublic school, which teaches subjects comparable to those taught in the public schools to children of corresponding age and grade."[16] The state's regulatory scheme consisted of a simple review of nonpublic school curricula, which involved submission of enrollment records, teacher qualifications, and courses of study.

In concluding that the state's requirements did not violate the constitutionally significant religious group's free exercise rights, the court found no regulatory burden on religious belief. In balancing any minimal burden on the religious group against the state's interest in regulating quality of education, the court noted that state constitutional and statutory law recognized the importance of providing education for youth and found that absent the regulatory policy the state would have no reasonable assurance that its recognized interest would be realized. Further, the court found the state's interest sufficiently urgent to be classified as "compelling," satisfying the standard that any intrusion on first amendment rights can be justified only if it is a compelling state interest.[17]

A private religious school sought to operate without meeting the required program approval and attendance reporting requirements of the state of Nebraska. In authorizing injunctive relief, the Nebraska Supreme Court ruled that state reporting and approval requirements were reasonable, based upon the state's compelling interest to mandate minimum educational standards for nonpublic schools. "All private, denominational, and parochial schools in the State of Nebraska . . . shall be subject to and governed by the provisions of general school laws of the state so far as the same apply to the grades, qualifications, and certification of teachers and promotion of pupils."[18] The court reasoned that a claim of free exercise of religion would not suffice to allow a private school to operate "completely unfettered by reasonable government regulations as to the quality of education furnished."[19]

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[16] Mich. Stat. Ann. § 15.41561(3) (a) (Callaghan).

[17] Sheridian Rd. Baptist Church v. Department of Educ., 348 N.W.2d 263 (Mich. Ct. App. 1984).

[18] Neb. Rev. Stat. § 79-1701 (1976).

[19] State *ex rel.* Douglas v. Faith Baptist Church, 207 Neb. 802, 301 N.W.2d 571, 579 (1981), *appeal dismissed,* 454 U.S. 803 (1981). *See also* State *ex rel.* Douglas v. Calvary Academy, 348 N.W.2d 898 (Neb. 1984); State *ex rel.* Kandt v. North Platte Baptist Church, 345 N.W.2d 19 (Neb. 1984).

There have been cases in which the burden placed by the state upon the private religious school is so onerous as to invalidate the state law. In such instances, the regulations amounted to constructive abolition of the private school, or, alternately, they so pervasively regulated the enterprise as to virtually eliminate any distinction between public and private schools. Educational standards which required private schools to strictly conform to instructional time, course curriculum, and local board discretionary policies have been held by the Ohio Supreme Court to be too extreme an effort to achieve equivalency.[20] Prohibitions on private school operation while public schools were in session, coupled with rigid requirements for adoption of public education textbooks and curricula, have been found to violate federal constitutional rights.[21]

The Kentucky Supreme Court has held that state accreditation requirements for nonpublic schools violated a state constitutional provision prohibiting the state from compelling parents to send their children to a school to which the parent was conscientiously opposed. Recognizing the state's interest in insuring adequacy of education, the court nevertheless regarded the imposition of accreditation, teacher certification, and approved textbook requirements to be an onerous burden on freedom of conscience. As a less burdensome alternative to effectuate the state's purpose, the court proposed legislative adoption of an appropriate standardized achievement test which could assess the outcomes of private schooling. The court reasoned that such a measure would enable the state to assess educational quality, identify schools which met acceptable standards, and close schools which failed to meet the standards.[22]

A religious group's refusal to comply with Nebraska school laws related to the operation of a religious school led to a state court order securing the church and school (one building) with padlocks on dates and at times other than during weekend and Wednesday evening religious services. In reversing the order, the Eighth Circuit Court of Appeals concluded that the state's interest in preventing operation of the school, although compelling, could be achieved through less restrictive means than through court orders which effectively denied both religious freedom and freedom of speech and association.[23]

Religious schools, led by the Maine Association of Christian Schools, challenged the constitutionality of state approval requirements for the operation of private schools on the ground that church schools were integral parts of the religious ministry and not susceptible to state control. While declining to resolve this issue, the federal district court was obliged to address the state's authority to enjoin operation of the religious schools and to prosecute the school leadership for inducing habitual truancy. The court found no specific statutory obligation compelling the religious schools to seek approval and ordered state school officials not to seek prosecutions under truancy laws, as the operation of "unapproved" schools did not constitute an inducement to habitual truancy. While finding no requirement that the religious schools seek approval, the district court did make clear that a remedy at law existed in a truancy action against the parent if it could be established that the children educated in the religious school were not receiving equivalent education. The court's decision emphasized truancy prosecutions over school closings for the "singularly sufficient reason that the Maine Legislature has *mandated* truancy-law enforcement and has never *authorized* the closing of a private school by courts or administrators for any reason relevant to the present action."[24] (emphasis in the original)

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[20] State v. Whisner, 351 N.E.2d 750 (Ohio 1976).

[21] Farrington v. Tokushige, 273 U.S. 284 (1927).

[22] Kentucky State Bd. of Educ. v. Rudasill, 589 S.W.2d 877 (Ky. 1979), *cert. denied*, 446 U.S. 938 (1980).

[23] McCurry v. Tesch, 738 F.2d 271 (8th Cir. 1984).

Establishment Clause

In determining whether a state law violates the establishment clause of the first amendment, the United States Supreme Court has applied a three-part test. The state law must have a secular legislative purpose, a primary effect which neither advances nor inhibits religion and *a consequence which would not foster excessive government entanglement with religion.*[25] The latter test, focusing on the degree of entanglement between the religious group and state agents, does not prohibit regulatory oversight by the state, particularly when such oversight can be characterized as occasional or period contact as opposed to "a comprehensive, discriminating and continuing state surveillance."[26]

Reasonable licensure requirements for private religious institutions granting education degrees have been upheld by the New Jersey Supreme Court and found not to violate the establishment clause of the first amendment. In applying state licensure requirements to a private, fundamentalist Christian College which sought to award baccalaureate degrees, the court concluded that the indirect burden on free exercise of religion was not so substantial as to override the state's compelling interest in the maintenance of uniform academic standards which would preserve the basic integrity of the degree. In addressing the issue of excessive entanglement, the court found licensure regulations did not require active involvement in or comprehensive surveillance of the college's instructional program.[27]

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[24] Bangor Baptist Church v. State of Maine, Dept. of Educ., 576 F. Supp. 1299, 1326 (D. Me. 1983).

[25] Wolman v. Walter, 433 U.S. 229 (1977).

[26] Lemon v. Kurtzman, 403 U.S. 602, 619 (1971).

Vagueness

The constitutional doctrine of due process, as embodied in the fifth and fourteenth amendments, prohibits the federal government or a state from holding individuals responsible for conduct which the individual could not reasonably understand to be proscribed. This principle of due process, otherwise known as the vagueness doctrine, has been applied to require that a criminal statute be sufficiently definite to give a person of ordinary intelligence fair notice of the behavior which is prohibited.[28] Absent such definiteness, enforcement of the law becomes subjective and potentially arbitrary and capricious.

Public education policy standards imposed on private schools are not likely to attain the degree of specificity required in cases involving due process for criminal misconduct. It is legally sufficient that requirements imposed on private schools are uniformly applied to public sector schools and are as reasonably precise as the subject matter permits.[29] However, the enforcement of compulsory school attendance laws against parents often involves prosecution under truancy provisions which compel rigorous due process protection that would prohibit vagueness.

State courts have historically addressed the meaning of "school" as it appears in compulsory education requirements.[30] In most instances, the meaning is determined from common usage or literal translation. Judicial interpretation has not yielded a uniform definition of the term, however, and one authority has noted an increase in litigation, particularly in cases in which parents have insisted that home instruction qualifies as a form of schooling within the requirements of compulsory attendance laws.[31]

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[27] New Jersey State Bd. of Educ. v. Shelton College, 448 A.2d 988 (1982). *See also* Minami v. Andrews, 651 P.2d 473 (Hawaii 1983) (licensing requirement for private religious school upheld).

[28] *See* Grayned v. City of Rockford, 408 U.S. 104 (1972).

[29] Scoma v. Chicago Bd. of Educ., 391 F. Supp. 452 (N.D. Ill. 1974).

[30] *See, e.g.*, Grigg v. Virginia, 224 Va. 356, 297 S.E.2d 799 (1982) (home instruction would not qualify as a "school" within the meaning of compulsory attendance law); Voisard v. County of Lake, 169 N.E.2nd 805 (1960) (day camp offering systematic instruction in recognized academic subjects was a "school" although a private enterprise); and State v. Peterman, 70 N.E.2d 550 (1904) (home instruction offered by a former public school teacher qualified as a school experience).

Wisconsin's compulsory school attendance law, which provided that a person having control of children between the ages of six and eighteen had to cause that child to regularly attend either a public or private school, was struck down by the Supreme Court of Washington as vague.[32] In the principal case, a local school superintendent had informed a parent whose child attended a private school that compliance with the compulsory attendance law required the parent to enroll his child in a private school listed in the state's directory. Since the private school in which the child was enrolled was not listed, the parent was convicted and served two consecutive ninty-day jail sentences. Reversing this decision, the court found the state law silent on the question of what constituted a private school. In its ruling, the court admonished the state legislature to specify the meaning to be attributed to the phrase "private school" so that neither citizens nor the court would be obliged to guess at its meaning.

Georgia's compulsory school attendance law provided that every parent having control of a child between the ages of seven and sixteen shall enroll the child in and send the child to a public or private school.[33] Two parents arrested for failing to enroll their children under provisions of the law defended on the grounds that their three school age children were being taught at home in a private school operated by the parents. Neither parent possessed a teaching certificate or any formal training or experience as a teacher.

The Supreme Court of Georgia held the state's compulsory school attendance law void as unconstitutionally vague. The meaning reasonable persons would ascribe to the term "private school" was considered insufficiently definite. The failure to define the phrase "private school" or to prescribe criteria which would allow qualification as a private school led the court to conclude: "Although we agree that the word 'school' clearly puts one on notice that an organized education must be provided to the child, there are many questions concerning the scope, nature and place of the education which are left unanswered by statute or applicable authorities."[34]

Because the phrase "private school" was susceptible to alternative

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31. Lines & Bray, *What Is a School?*, 16 West's Educ. L. Rep 2, 371-77 (1984).

32. State v. Popanz, 332 N.W.2d 750 (1983). *See also* State v. White, 112 Wis. 178, 332 N.W.2d 756 (1983) (reversing a conviction despite defendant's plea of guilty to a violation of compulsory attendance laws); State v. Davis, 598 S.W.2d 189 (Mo. App. 1979) (legislature admonished to explicate what constitutes an adequate public school education so that eqivalence of home instruction could be assessed).

33. Ga. Code Ann. § 20-2-690.

34. Roemhild v. State, 308 S.E.2d 154, 158 (Ga. 1983).

interpretations, the court found that the application of the compulsory attendance law would be susceptible to ad hoc or subjective standards which might pose the danger of arbitrary and discriminatory enforcement. Such an inadequacy was demonstrated by the lack of any minimum standards which could be communicated to the parents in order that they might determine whether they were in compliance with state law.

In dissent, three judges insisted that the state's compulsory education law should not be destroyed simply because it did not define all phrases in a manner characteristic of bureaucratic "genius." Argued the dissent:

> In order to resolve this issue in total accord with the established longevity of compulsory education, with the precedents in our state law, and with . . . common sense, we need only inquire as to whether or not the activities provided by the (parents) met the dictionary definition of school as "an organized source of education or training as (1) an institution for the teaching of children."[35]

While Wisconsin and Georgia decisions have recognized vagueness in the application of criminal sanctions for failure to comply with compulsory attendance laws, the Supreme Court of Arkansas has concluded that statutory language which specifies that parents are to "send" children to a "public, private or parochial school" is sufficiently clear to inform one of average intelligence as to the meaning of the law. Such a provision, reasoned the court, when applied to one who sought to educate his child at home, would give adequate notice that the home instruction program violated common understanding of the term "school" as an institution to which the child is sent.[36]

In some instances, states will undertake truancy actions against the child, rather than prosecute the parent. The Kansas Code for Care of Children defines a child in need of care as one who is less than eighteen years of age not attending school.[37] In upholding a finding that two Kansas children were "in need of care" the Kansas Supreme Court ruled a home instruction program offered by a parent who possessed a high school diploma but no teacher certification did not meet Kansas statutory requirements for instruction. Kansas statutes on compulsory attendance defined a nonpublic school as a "private, denominational or parochial school taught by a competent instructor for a period of time which is substantially equivalent to the period of time the public school is maintained in the school district."[38]

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[35] *Id.* at 160.

[36] Burrow v. State, 669 S.W.2d 441 (Ark. 1984).

[37] Kan. Stat. Ann. 1982 Supp. § 38-1502(6).

In finding that there was substantial competent evidence on which to base a finding that home instruction was not a school within the meaning of Kansas law, the court gave particular attention to the lack of teacher certification or teaching experience and insufficient lesson planning or scheduling. Although incorporated, the home instruction "school" was not accredited and only the two siblings were taught. In concluding that such an arrangement would not suffice, the court added:

> We find the (parent's) plan, though well intentioned, a thinly veiled subterfuge attacking compulsory school attendance. If such a family arrangement will serve as a substitute for school there is no compulsory school attendance.[39]

Parent's Right to Direct Education

Challenges to compulsory attendance laws which invoke the parent's right to direct the education of the child might be predicated upon an implied right to privacy, equal protection gurantees of the fourteenth amendment, or liberty interests insuring due process of law. Courts have been reluctant to grant exceptions to compulsory attendance laws on constitutional grounds, particularly when the asserted right to guide or direct the child's education is poorly defined or conflicts with a substantial state interest such as compliance with a desegregation order.[40]

In a novel challenge to the enforcement of criminal sanctions against the parent for violation of compulsory attendance laws, a New Mexico appellate court was asked to assess whether the exclusion of home instruction as one means of satisfying the compulsory attendance law violated equal protection under the state constitution or the fourteenth amendment. The appellate court concluded that such an exclusion bears a rational relationship to a legitimate state purpose in that the exclusion removes the child from the supervision of the immediate family and exposes that child to at least one other set of values, attitudes, or lifestyle.[41] Not considered on appeal was the question of whether the law violated privacy or free exercise of religion under the Federal Constitution.

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[38] Kan. Stat. Ann. § 72-1111(a)(2).

[39] *In re* Sawyer, 672 P.2d 1093, 1097 (Kan. 1983).

[40] *See* State v. Chavis, 263 S.E.2d 356 (N.C. App. 1980), *cert. denied*, 267 S.E.2d 679 (N.C. 1980).

[41] State v. Edgington, 663 P.2d 374 (N.M. Ct. App. 1983). *But see* Strasnider v. Strosnider, 686 P.2d 981 (N.M. Ct. App. 1984) (program established by parent at location other than home, in which older sister taught six minor children and three

The West Virginia Supreme Court upheld the conviction of parents for violation of compulsory attendance laws despite a claim that the parents had a right to educate their children in the home without seeking approval of the local school board. State law allowed an exemption from school attendance for children instructed in the home provided the local board attests to the adequacy of the instruction provided. In concluding that such a requirement was reasonable, the court emphasized that an assessment of what constitutes a "qualified instructor" was a decision to be made in light of the instructor's ability to provide diverse educational experiences which must "develop the minds, bodies and social morality (of pupils) . . . to prepare them for useful and happy occupations, recreation and citizenship."[42]

In recognizing the state's interest and power to impose reasonable regulations on the provision of basic education, the Supreme Court of Maine ruled that a requirement that parents seek approval for home instruction plans was held to be proper. The parents sought to educate their children in the home, but refused to submit a plan for home education. In an appeal from civil statutory fines based upon a finding that the children were habitually truant, the court was asked to balance the parent's claim of a right to educate the child in the home, predicated on a liberty interest involving fourteenth amendment due process, against the state's requirement that parents obtain the prior approval of public school officials for home education programs. In ruling the regulatory requirement reasonable, the court found that there was no actual denial of the parent's asserted right to educate the child at home and directed the parent to keep the children in public school pending approval of a home instruction plan submitted to the local board of education.[43]

A child was found to be truant under Nebraska law despite the fact that the parent withheld the child from attending because he allegedly suffered from a form of enuresis which caused him embarrassment at school. The parents had requested an exception to the compulsory attendance law out of their concern for the child's wel-

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other children unrelated to the family, did qualify as a private school under New Mexico statutes requiring compulsory attendance).

[42] State v. Riddle, 285 S.E.2d 359, 364 (W. Va. 1981).

[43] State v. McDonough, 468 A.2d 977 (Me. 1983). *See also In re* Kilroy, 467 N.Y.S.2d 318 (N.Y. Fam. Ct. 1983) (Parents had no right to refuse to permit education authorities to visit their home instruction site in order to determine whether the instruction was "equivalent" to that which satisfies the state's compulsory education statute).

fare: the school board denied the request. On appeal, the Nebraska Supreme Court affirmed the truancy decision, granting substantial deference to the school board's authority to deny exemption and concluding that parental permission to be absent from school would not change the nature of the violation.[44]

Conclusions

State compulsory attendance laws are subject to legal challenge on a number of constitutional grounds. These statutes are comprehensive enactments which often involve provisions specifying the "adequacy" of educational programs, prohibiting certain forms of education, and elaborating penalties for failure to conform to provisions for appropriate schooling. As such, these laws are vulnerable where delegations of legislative power exceed the authority of administrative agencies, where ambiguities in statutory language permit unbridled discretion in enforcement policy, and where implementation of policies denies fundamental rights secured by state and federal constitutions.

State and local school boards are faced with the responsibility to implement legislative policies and enforce sanctions for noncompliance with compulsory attendance laws. As such, these agencies are vulnerable to legal attacks on both the formulation and implementation of policy. Absent express statutory authority, state and local boards are not generally empowered to regulate private education nor can these entities enforce civil or criminal sanctions for noncompliance when state statutes fail to specifically define the nature of the wrong.

The broad discretion once accorded to state and local school boards in rule-making and enforcement of compulsory attendance laws has been subject to increasing scrutiny by state and federal courts as parents and private religious groups seek to define the limits of governmental intrusion into the area of education of the young. While there is little constitutional doctrine that would prohibit a state legislature from setting minimum standards for private schools, many state legislatures have not acted to specify what qualifies an educational entity as a private school or to delineate the state's scope of authority in regulating or enforcing compulsory attendance laws.[45] As judges encounter an increasing number of legal challenges to compulsory attendance policies, they are likely to rebel at the notion that courts should extend state authority where the legislature has failed to do so. The corresponding dilemma for state and local school boards is whether to implement policies that may be subject to legal attack and that may result in extraordinary costs and a diminution of state and local authority to regulate the provision of educational services.

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[44] *In re* K.S., 346 N.W.2d 417 (Neb. 1984). *See also In re* Pierce, 451 A.2d 363 (N.H. 1982) (Manifest educational hardship must be established to justify approval of home instruction.

[45] *See* Lines, *Private Education Alternatives and State Regulations,* 12 J. L. & Educ. 189 (1983).

While the prospect of litigating some issues may hold the promise of clarifying the state's authority to implement compulsory attendance laws, a conscientious review and revision of state compulsory attendance laws may be warranted in many jurisdictions. The formulation of policies that clarify legislative intent with regard to the regulation of private schools, and that specify the instrumentality as well as the purpose and scope of authority of those agencies which must enforce compulsory attendance, will be an imperative in many jurisdictions, some of which have not considered the meaning and intent of compulsory attendance laws in over a century of progressive educational reform in the public sector.

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Due Process Prevents Educators' Doing Only What They Should Not Do

William W. Wayson

We must have disciplined institutions if we are to have disciplined citizens. The foundations of a free society rest upon a social contract which specifies that social institutions are responsible for providing services to everyone. In return, individuals exercise responsible citizenship and adhere to basic norms governing life within the community. If institutions break their side of the social contract, citizens lose faith in government and its agencies. With that faith gone, society waivers between disruption and police power.

When asked what the greatest purpose for schooling should be, Horace Mann named self-discipline.[1] The greatest contribution any educator can make to the nation is a self-disciplined citizen who knows what needs doing and has the skill and the will to do it for as long as necessary.

Discipline problems in a school are not a disruption of teaching; they call for the highest levels of teaching skill. James Hymes says that disciplining is the slow, tedious, day-by-day process of teaching people the sense of doing right.[2]

Discipline must be taught in the circumstance in which the disciplined behavior is required. If we kept a roomful of people in a room with nothing to do, as we do when we put students in study halls, they would soon create discipline problems. We would have *taught* them to be disruptive by the way in which we treated them and by the circumstances in which we put them. Similarly, and unintendedly, we often *teach* students to behave disruptively.

No school needs to be disruptive. That statement represents experiences as principal of two schools, both newly desegregated, and twelve years' work with hundreds of teachers in courses and work-shops on school discipline as well as direct interventions with many schools, some considered the "worst" in their districts. There is probably no school that cannot be turned around if one has the will, the time and resources for doing so.

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[1] H. Mann, *Ninth Annual Report* (1845) quoted in The Republic and the School: Horace Mann on the Education of Free Man 57-59 (L. Cremin ed. 1957).

[2] J. Hymes, Behavior and Misbehavior: A Teacher's Guide to Action (Prentice-Hall 1955).

The necessary resources are freedom and incentive more than fiscal or physical (though many schools are designed to maximize disruptions and could benefit from reorganization and new enrollment and assignment practices that might cost more). My class on the principalship recently drove all Thursday night, visited schools in St. Louis on Friday, spent some time with the school staff on Friday night and on Saturday morning. The biggest surprise for my graduate students (all practicing teachers and administrators) was that teachers would work on Friday night and Saturday morning by their own choice. Those teachers worked in a middle school in which 96% of the children received free lunch; yet, their school was well disciplined, orderly, and productive. Ninety-plus percent of the students were above grade level norms on achievement tests in reading and 85% above in mathematics. Children were not paddled, nor were they unduly mistreated. We visited three elementary schools with the same characteristics. Staff members in all four schools were filled with the vitality and enthusiasm that comes from being on a winning team that does a difficult job well.[3]

Any school could be like that, but where do you start if your child or your neighborhood has one of those "under achieving schools" with which you are very dissatisfied? The most important single factor in a good school is the school principal, and that's probably the place to start. But you can't stop there; the school cannot improve without having a school faculty and a staff noncertified personnel who relate in productive ways with the students. After that you might concern yourself with other factors, but none of those factors would be a reduction in due process or close attention to preserving the rights of every individual in the school.[4]

Any disruption of the educational process is a problem and should not be condoned. A well disciplined and safe school is essential for teaching and for learning positive things. I have emphasized *positive* teachings and learnings because students always learn *something* from their experiences in schools; they often are taught quite opposite behaviors and values from what we think we are teaching them. For example, bells are a curriculum for teaching obedience to faceless authority. More bells ring in schools serving poor children than in schools serving wealthy children. The hidden curriculum for teaching poorer children to obey authority is probably stronger than the one teaching them how to exercise responsible freedom.

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[3] The particular school mentioned here is Stowe Middle School, one of four schools in the original SHAL project initiated by Dr. Rufus Young and his staff in Area V of the St. Louis school system. We have seen other schools in other cities that exhibit the same high level of professional responsibility. None are coercive, punitive or exclusionary in their disciplinary policies.

[4] See the discussion of student belongingness in W. Wayson, G. DeVoss, S. Kaeser, T. Lasley, & G. Pinnell, Handbook for Developing Schools With Good Discipline 37-41 (Phi Delta Kappa 1982).

The discipline necessary for responsible freedom is learned, and it must be taught in the slow tedious manner that Hymes describes. It is not "enforced." It is not made by laws. Every high school principal has the same task that George Washington had when he became President of thirteen independent nations: to make them into one nation with loyalty, commitment to each other, and to a set of agreed-on operating procedures, or rules. Making that nation and creating a cohesive school cannot be legislated nor can it be forced; it must be taught. It is best taught when government upholds its end of the social contract and guarantees every citizen due process.

A few years ago, certain groups in this country began to attack due process. It was a surprise to me, because we had markedly improved an inner city school in Syracuse, New York, by using due process *as a curriculum* for teaching students the following things:

> that they belonged in the schools;
> that they were respected there;
> that they were safe there;
> that the school and its authority deserved their respect;
> that they had responsibilities to all others in the school;
> that they could learn processes for resolving conflicts rationally and to the satisfaction of both parties.[5]

From that perspective, attacks on due process are as surprising as an assertion that we could have stronger families without honesty, discussion and mutual attention to members' feelings. Due process, in school as in society, is an educational process, a lesson plan, for teaching the student that he or she is valued, for teaching that authority exists as much to protect his or her individual rights as to protect the rights of others, to foster his or her allegiance and loyalty to the school, and to teach respect for the American system, even when the student or his parents might have reason to feel the system has abandoned them.

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[5] Wayson, *Organizing Urban Schools for Responsible Education*, School Discipline and Violence, Phi Delta Kappan, Feb. 1971, at 344-47.

A dissertation by Cynthia Kelly at the University of Wisconsin indicates that students do learn to respect themselves and the institution more in schools where due process is used than in schools where it is not.[6] Due process is a way of communicating that a person belongs in the social unit, that he or she will be respected as fully as they are expected to respect social agencies. People who are not fully respected are marginal in society; they are taught, by poor and unfair treatment, that they do not belong. Not to belong is to be marginal in the unit.

Marginality is directly related to delinquent social behavior. When Irish people in Boston could not get fair treatment in schools, they were barred from decent housing and could not get into bars in Boston, their crime rate was as high as we have found among any marginal group since that time. Marginality is directly related to delinquent behavior in families, communities, and society. That's why the British Bobby carries no gun; after 400 years of social struggle to democratize the institutions in England, the policeman is now seen as serving all of society. In the United States, our institutions are still serving the major purpose of those who forged the Constitution: to protect property and property owners.[7] Accordingly, many people are taught by neglect of their rights that they are marginal. Due process must be seen as a means for reducing marginality by extending social benefits to seal the social contract between the individual and society or its agency.

Taken at face value, the question whether due process ties the administrator's hands is totally absurd. Of course, due process ties the administrator's hands; that is precisely how English common law and American case law came to be what it is. The Magna Carta tied King John's hands and expanded freedom to a new group of people over whom he formerly held and exercised oppressive power. Historically, due process emerged as a way of guaranteeing rights and the privileges of governmental protection to a wider range of people in English and American institutions. Due process, of course, ties administrators' hands just as due process keeps a husband from beating his wife the way he used to beat her. Due process means that a worker has the right to hear and to be heard if brought up on certain charges and fired.

Taken in another light, the proposition is equally absurd. How can American schools and their personnel even think of denying due process as a fundamental foundation for living and learning to live in a free nation. Would any teacher who says the government has tied his/her hands advocate giving up his or her *own* right to due process because it limits the school board's ability to dismiss teachers on the word of unnamed accusers with no right to know what the charges are?

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[6] C. Kelly, Due Process in the Schools: the View From Inside (unpublished doctoral dissertation, University of Wisconsin 1979).

[7] A. Schlesinger, The Age of Jackson (1945).

To question whether due process ties administrators' hands is also absurd if one knows anything about disciplinary practices in schools today. Corporal punishment, suspensions and subterfuges for circumventing the law occur in numbers that would astound most citizens. Punishments are levied for reasons that are both laughable and shocking. It is a national disgrace. Rather than using government to support such schools we should launch investigations into professional malpractice and utilize resources to teach educators how to use more educational alternatives for teaching students who need instruction and guidance to become responsible and self-disciplined.

One Milwaukee school had a suspension rate in excess of 200% in 1979 because the principal felt he could not resist a clause in the union contract that was interpreted to say that the principal had to follow teachers' recommendations for punishment or fill out a long form. The principal had an astonishing number of referrals every day, and students were ejected from the school in huge numbers. In Cleveland in 1979, we chose Hart Junior High School as a setting in which to teach self-discipline in newly desegregated schools because it had reported suspension rates that were near 140%.[8]

Columbus, Ohio reported nearly 30,000 corporal punishments a few years ago. When one of the administrators was asked about it, he commented that the figure sounded like a lot, but if you considered that there were 70,000 students and that meant that there were only about four every ten minutes getting hit, that didn't seem so bad. I know a teacher who paddled a child in front of the class every day after the noon break to show the others what would happen if they did anything wrong. A school in Farmington, New Mexico had a principal in 1982 who had strapped (the method of punishment is to use a leather strap to administer swats) more than 300 children that year. He called in an innocent student and strapped him so that the news photographer could take a picture showing how that school kept discipline! Those are examples of excessively punitive actions that could be found in every state and in many more school districts.[9]

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[8] G. Pinnell, Final Report of a Project to Develop Self Discipline in Newly Desegregated Secondary Schools in Cleveland and Columbus, Ohio (submitted to U.S. Department of Education, Grant No. G008001350, Project No. 713005 Ohio State University Research Foundation, June 1981).

Available figures indicate that about two million children a day are out of school for suspension, the major reason for which is *truancy.* Studies have shown that fewer than 2% of those suspensions are for any threat to life of property. Suspensions are being levied for such trivialities as wearing a hat in the hallway, rolling one's eyes at the teacher, sitting in the wrong seat at the cafeteria, and chewing gum![10] Irwin Hyman, director of the Center at Temple University that monitors corporal punishments and alternative ways to discipline, estimates that three million children a day are paddled in this country. Incidentally, teachers in Ohio have more rights than parents do; teachers are permitted by law to abuse children with a stick of wood; parents are not, and until 1985, the law prohibited even school boards from preventing them doing so.

It is absurd to assert that due process ties anyone's hand when those figures are so readily available.

Though we should never permit anyone to undermine anyone's rights for any excuse, the attack upon due process in schools would be slightly more palatable if the schools were as dangerous and crime-ridden as the propagandists would have us believe. But they are not. More schools in this country are well disciplined than are not. Terribly violent schools where there is lack of discipline are in the minority; indeed, they are difficult to find.

Understanding why anyone would attack due process and why anyone would exaggerate violence in the public schools[11] comes more easily if one understands the history of the Constitution and its relationship to the continual struggle for and against policies and practices designed to assure free universal education. Both the Constitution and struggle for public education are steeped in disagreements about the nature of people and the proper distribution of government services among those people.

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[9] National Coalition of Advocates for Students, Barriers to Excellence: Our Children at Risk (1985).

[10] Though the statistics are old, the general picture they present is still prevalent; so, we refer you to Children's Defense Fund, Children Out of School in America, (1974); and Children's Defense Fund, *School Suspensions: Are They Helping Children?* (1975). *See also* I. Hyman & J. Wise, Corporal Punishment In American Education (1979). For more recent studies, *see e.g.,* J. Harris & C. Bennett, Student Discipline: Legal, Empirical, and Educational Perspectives (1982). School Discipline and Violence, (President Reagan has consistently praised a school principal whose school has a 50% dropout rate for suspending 300 students during his first term in office).

[11] For an example of the distortion of data see G. Bauer, *Disorder in Our Schools* (Report to President Reagan, Feb. 3, 1984). The same assertions have been printed (at the behest of Mr. Bauer) in the *Phi Delta Kappan* March 1985. *See* discussion by Scherer & Stimson, *Pseudo vs. Real Issues: Is School Violence a Serious Concern?* The School Administrator, March 1984 at 19-20, 55.

We seldom teach that the Constitution is really two constitutions. First, it is a structural design establishing governmental processes to protect property. That design was developed by the Hamiltonians, the aristocrats, the property owners. The Hamiltonians, the Adamses, and the people who wrote that Constitution believed that government existed only for a few good people who knew how to run the world. If government gave them all the benefits, they would trickle some benefits down on the rest of society.

The second Constitution is the Bill of Rights, stirred up by Jefferson after he came back from Europe, where he was when the first constitution was written. The Bill of Rights was designed to protect individuals from excessive use of governmental power by the aristocratic property owners. The Jeffersonians believed in democratic government and processes in which greater numbers of individuals were entitled to governmental protections in return for which they would safeguard freedom.

After retiring from public life, John Adams and Thomas Jefferson frequently corresponded about that different philosophy, about what people were and what government was for.[12]

> Inequalities of mind and body are so established by God Almighty . . . that no art or policy can ever plane them down to a level. (Mr. Adams to Mr. Jefferson).
>
> [T]here is a natural aristocracy among men. The grounds are virtue and talents. . . . There is also an artificial aristocracy, founded on wealth and birth. . . . The natural aristocracy I consider as the most precious gift of nature, for the instruction, the trusts, and government of society . . . the best remedy is . . . to leave to the citizens the free election and separation of the aristoi from the pseudo-aristoi. . . . An insurrection has consequently begun, of science, talents, and courage, against rank and birth, which have fallen into contempt. (Mr. Jefferson to Mr. Adams).
>
> I only say that mankind have not yet discovered any remedy against irresistible corruption in elections to offices of great power and profit but by making them hereditary. (Adams to Jefferson).

Both sides have an internal logic, and their ongoing debate will continue throughout our country's history. We are now experiencing the 1985 version of it. It is impossible to *prove* one side or the other. Maybe there are a few geniuses born to rule the world, and maybe they are born only in certain superior groups or families. Both arguments have internal logic; both have truth; both ignore some truths; both have forefathers they can fall back on to prove their assertions; both have historical precedents; and both can claim to be for "the people" because each has a peculiar definition of who "the real people" are. Proponents of the two sides are unlikely to reach agreement. The underlying philosophy about the nature of people and the role of government is pre-eminent in determining what is accepted as truth, who is authoritative and what information they will accept.

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[12] Adams and Jefferson Letters (n.d.)

The difference is not incidental to the debate over due process in schools. Historically, the Hamiltonians and their descendants, did not want public schools; the Jeffersonians did. The Hamiltonians wanted to spend public money only for minimal training for paupers who posed a threat to property rights in large cities; the Jeffersonian forces wanted every child to get the same education afforded the wealthy. The Hamiltonians wanted governmental agencies to exercise punitive and authoritarian methods to protect society from the lower animal natures of the poorer classes; the Jeffersonians advocated protections against those methods and favored greater faith in each person and more caring methods. The Hamiltonians believed people (other than themselves) to be lazy, untrustworthy, and in constant need of instruction and control from their betters; the Jeffersonians felt that basic good existed in human nature and that people could be depended upon, given all the facts, to make good decisions and to work for the common good in most instances. Almost all political (and educational) issues in American life center upon the debate between the two forces.[13]

Whether one feels that it is easier to govern by assuring, rather than manipulating ignorance and prejudice in the population or to involve an educated and informed population fully in the governing process, it appears indisputable that the ability to govern depends upon acceptance by those who are governed. To win that acceptance for any length of time, government must uphold its end of the social contract or must resort to tyrannical means of control.

Government at all levels must protect children or young adults, or adults for that matter, from abuse, unwarranted accusations and denial of their rights. Unless we attribute deity to school officials

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[13] For descriptions of the times and the debates, *see, supra* note 7, A. Schlesinger; L. Cremin, The Transformation of the School 8-20 (1964). *See also* S. Rothstein, The Power to Punish: A Social Inquiry into Coercion and Control in Urban Schools (1984).

(thereby depriving them of their essential human rights), we must admit that they often, under pressure, make mistakes. Like other human beings, they may lack tolerance, insight, knowledge or skill for making good judgments at all times. Whatever the cause for mistakes or misjudgments, government must see that people are protected from any of those weaknesses.

A pervasive need in our schools today is to evoke personal commitment and responsibility from all participants at all levels. All have a role to play and must play it well if our schools are truly to serve American citizens. Our schools need to stress personal responsibility on the part of every teacher to teach the students they have rather than to throw them out of school, to protect students' rights, and to ask for (and get) help if they do not know how to do any part of their job. Students must be taught to be personally responsible for coming to school, to clean up their own messes, to take part in their own learning. To teach that responsibility, we must treat them seriosly and give them responsible roles.

Just what does the law require school personnel to do to meet the requirements of due process? Schimmel, Lufler and others[14] have shown that the law requires, as the *Goss* decision states, "less than good principals require of themselves."[15] Good principals do hear the student's side of a case to make sure he/she knows what his/her rights are in that school and to assure that those rights will be met and that no injustice is done. The law requires far less than good principals require. Indeed, the law requires far less than you would want if you were accused of molesting a child in your school.

> Students . . . have a right to fair treatment, in school as in society: to be presumed innocent until proven guilty, with fair warning and fair hearing.[16]

Though it is less clearly established yet in law, professional ethics would dictate that they also have a right to be as fully educated as possible — whether or not they seem eager and willing — by people who exhibit the highest levels of civic and professional responsibility.

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[14] L. Fischer & D. Schimmel, The Rights of Students and Teachers 298-327 (1982); *also* D. Schimmel, *Discipline, Due Process and Religion in the Schools,* (xeroxed manuscript available from author); and D. Schimmel & R. Williams, *Does Due Process Interfere with School Discipline?,* School Discipline and Violence (manuscript prepared for Phi Delta Kappan). *See also* E. Hollingsworth, H. Lufler, & W. Clune III, School Discipline: Order and Autonomy (1984). A. Schlesinger, The Age of Jackson, (1945).

[15] Goss v. Lopez, 419 U.S. 565 (1975).

[16] Carter, Harris & Brown, *Student and Parent Rights: What Are Their Constitutional Guarantees?* NOLPE Sch. L.J. 45-60 (1976).

The restrictions that gall, and perhaps hamper educators are not laid down by courts anyway. When I push people who tell me that the law has tied their hands, the restrictions they cite almost universally are rooted in local and state policy, not in federal court decisions. Excessively legalistic and restrictive codes are adopted by local authorities, not prescribed by judicial mandate. Overreactive policies are promulgated by state or local officials or functionaries; they are not rooted in legal principles.

Competent administrators and teachers are concerned about rigid and legalistic discipline codes. I have been asking educators what they are willing to die for. They are not willing to die for much, just as German educators in 1938 were not. The question is always appropriate for educators in a free society, as anyone who has experienced anti-desegregation rallies or book censoring hysteria can attest. In Guatemala, in Chile, in El Salvador, in Brazil, in Iran and probably in other places teachers have been shot because they are teachers, and good teachers are always a threat to tyranny. At times when repression has control of government, good students are also threats. Teachers may have to risk personal harm to protect them as some German teachers did under the Hitler regime, or as teachers in Linden-McKinley High School in Columbus, Ohio had to in 1971 when the police were sent to take control of the school and teachers experienced helpless fear as their black students and colleagues were beaten and humiliated because of public prejudice and official overreaction against singing the *Lift Every Voice and Sing,* an old and beautiful hymn that is sometimes called "The Black National Anthem."[17]

Rigid and overly-legalistic discipline codes can be forerunners of mindless repression, and their widespread adoption in American schools probably has worsened discipline, undermined educational outcomes and undermined public confidence in schools. Though courts often have required schools to adopt codes as a safeguard against prejudice, our experience indicates that more minority students may be out of school because of such codes, because their very rigidity in the hands of fearful administrators prevents the application of professional judgment that would benefit the student more than suspension.

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[17] News stories about the incident may be reviewed in the Columbus Dispatch articles for the period from March through May, 1971; however, the true story of the events was not publicized but is available in taped interviews that I have and in the Columbus municipal court records of trials held for Thomas Brown (vice principal from the school); Chris Voyles (guidance counselor); John Farley (first-year teacher); and Charles Ross (Professor from Ohio State University), all of whom were connected with the event.

Pinnell has listed advantages for codes as part of common school practice:[18]

- The process of developing a code can build a sense of community with agreed-upon norms for everyone in the school.
- If cooperatively developed, a code is more likely to be understood and supported.
- Expectations may be clearly stated so they can be understood and followed.
- School personnel can use written expectations to settle disagreements with parents or students.
- A well-developed, fair code can elicit trust and loyalty from students.
- If a bill of rights is included, the code can become a social contract, not merely a legal form.
- A code can be used to clarify the school's responsibilities to students, thereby ameliorating school causes for problems.

On the other hand, she cites disadvantages typically found in discipline codes:

- An inflexible code does not account for individual personalities or extenuating circumstances.
- If a code is instituted by administrators alone or only through a committee, it may not be supported by those who bear major responsibility for enforcing it.
- A code must be constantly updated so new staff and students feel they have been involved in creating or interpreting it.
- Clearly stating expectations and rights is a difficult process.

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[18] G. Pinnell, *The Catch 22 of School Discipline Policy Making* (paper delivered to the American Educational Research Association Annual Meeting, 1981). Revised version printed in Theory Into Practice (October 1985).

- Interpreting and using a code requires consensus and consistent effective judgment from staff members.

- A code can lead to emphasis on form rather than substance, adherence to the letter and not the spirit of procedures.

- A code often addresses procedural rather than substantive rights.

- A code seldom addresses staff responsibilities; so makes law appear discriminatory and one-sided.

- If a code becomes a set of explicit and minute rules, staff and students lose any sense of self-directed responsibility.

Less competent practitioners are immobilized by fear itself. They think they are going to get sued, even though the average school person never gets sued and doesn't even know anyone who did. One might observe, somewhat facetiously to be sure, that if an administrator hasn't been fired or sued he or she probably never did anything, but the number of suits and firings even in this litigious age are too small to make the joke meaningful! It may not always be so, particularly if the attacks on basic freedoms continue.

Asking what the law allows seems to be destroying common sense in the way we educate our children. Good educators don't make their decisions based on "what the law will let me do." They act responsibly on behalf of their students, using an abiding sense of justice. In fact, those most concerned with what the law will or will not let them do are often most out of touch with what is required and they most often ignore student rights and mistreat children. According to a study by Robert Van Brock, violent and unruly behavior is most likely to increase in schools in which administrators have come to fear litigation.[19]

Few teachers and principals know what the law requires. The teachers know less than the principals. Even our very ill-informed preservice teachers are now saying they can't do this or that "because of the law." We should not let fear among professionals deprive people of rights; we must help people overcome their fears. Some administrators have only superficial knowledge not far removed from the level of common gossip about court cases and decisions, and are ignorant about judicial principles and what courts actually require. Others are overly influenced by media coverage which makes it sound as though courts have given students unlimited rights. When responsible government officials make public statements saying that the law has undermined administrative authority, more credence is given to groundless anxieties, creating conditions that foster misbehavior and disruption.

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[19] Brock, *Coping with Suspensions and the Supreme Court,* Nat'l Ass'n Secondary Sch. Principals' Bull., March 1977 at 69. *See also* G. Gottfredson & D. Daiger, Disruption in Six Hundred Schools (Report number 289) (Center for Social Organization of Schools, Johns Hopkins University 1979). *See also* Gottfredson's testimony before the House Subcommittee on Elementary, Secondary and Vocational Education, January 23, 1984.

But how can educators best protect themselves against litigation? By running good schools such as those described in the *Handbook for Developing Schools with Good Discipline*[20] and the soon to be published, *Handbook for Developing Public Confidence in Schools.*[21] Rutter described what good schools do in his analysis of high achieving schools in London.[22] The Safe School study,[23] which has been so ill-used in recent governmental exaggerations of the violence in schools, described clearly what safe schools did. The Effective Schools research, while often simplified, describes what an observer finds in schools with unusually high productivity.[24] If one examines the schools selected in the past two years by the federal government as examples of excellence, they more closely fit the model depicted here than the punitive, rigid, elitist model that seems so attractive to the federal government today.[25] Effective, well-disciplined, high-achieving schools usually have most of the following characteristics:

- The staff works together to create a school that surrounds the student in and out of the classroom with environmental pressures, or reminders, that teach self-discipline and achievement.

- The people in the school view it as a place to do valuable, successful and productive work.

- School personnel make their decisions for the benefit of individual students as well as the group.

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[20] W. Wayson, Handbook, *supra* note 4.

[21] W. Wayson, C. Achilles, G. Pinnell, L. Cunningham, L. Carol & N. Lintz, Handbook for Developing Public Confidence in Schools (Phi Delta Kappa, in process for release, Fall 1985).

[22] M. Rutter, B. Maughan, P. Mortimore & J. Ouston, Fifteen Thousand Hours (1979).

[23] National Institute of Education, Violent Schools-Safe Schools (The Safe School Report to the Congress, Volume I, 1978).

[24] See several articles dealing with the characteristics of effective schools in Educational Leadership, Dec. 1982.

[25] We will present evidence of this in a report to Phi Delta Kappa on the effects of the *Excellence Movement on Local Schools* about September, 1985.

- School personnel emphasize positive and preventive, rather than punitive, practices. Discipline in the school comes neither from rules nor from isolated practices specifically aimed at attaining discipline.

- The staff in the school rarely adopt any practice wholesale, but they adapt all new practices and materials to meet their own needs and styles.

- The principal, usually in coalition with some emergent leaders from the school staff, plays a key role in making the school what it is. (That key role seems to be as true of bad schools as well as good.)

- School personnel have nearly unflagging faith in their students' ability to learn and in their own ability to teach, and they expend unusual energy to make the belief come true.

- Teachers handle most of the routine discipline problems themselves and usually in ways that minimally disrupt instruction.

- These schools have stronger than average and more frequent than usual ties with parents and the community they serve, and their personnel welcome and use critical review from a wide variety of sources in and out of the school.[26]

Effective teachers and principals whom we have interviewed don't ever mention the law as a reason for doing or not doing something except when they are using recent court decisions to inform some recalcitrant staff or board member or someone else who wants to violate students' rights. Less effective educators use the law as an excuse. Many of the statistics used to show that due process has ruined schools are really a gauge of their fears and anxieties. They ought to be dealt with in ways that would help them gain more skills and more confidence. What will our schools become if professionals do not learn that professional practice requires much more than the law ever could?

School people do what they do primarily because they do not know what else to do. Some paddle; some suspend; some violate the most essential rights of children. Most schools are well disciplined and most school people are doing their best; but sometimes student rights are violated because hurried or harried professionals don't know or can't think of what else to do. They violate the most essential rights of children for the same reason that doctors bled George Washington or architects insulated schools with asbestos. We can either use governmental sanction to deny or reify professional ignorance or we can use it to promote improved service to citizens.

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[26] L. Wake, A Study to Verify School Characteristics Believed to Improve School Discipline (unpublished M.A. Thesis, The Ohio State University 1983). *See also, supra* note 4, Handbook for Developing Schools with Good Discipline.

Due process is a way of life in such schools. Due process permeates interpersonal relationships and is based upon trust in one another and in rational processes. Officials sincerely presume that people at least *think* they have good reason for acting the way they do. Due process in these schools permits making human mistakes. Everyone is assumed innocent until proven guilty. Due process is seen as the best preventative for serious misbehavior. Cold and inflexible legalistic policies could harm the educational process in these schools; consequently, federal, state and local district policies should adhere to the spirit of due process as a pervasive principle of interpersonal relations and as an essential method for teaching responsible citizens.[27]

We can close this chapter in no better way than to quote one of the documents issued during the bitter struggle to establish free public schools serving all of America's children. No more powerful argument exists today for improving the quality of education without compromising free universal education, and no modern treatise would reveal better why due process is essential in the educational program:

> The original element of despotism is a monopoly of talent, which consigns the multitude to comparative ignorance, and secures the balance of knowledge on the side of the rich and the rulers. If then the healthy existence of a free government be . . . rooted in the will of the American people, it follows as a necessary consequence, of a government based upon that will, that this monopoly should be broken up, and that the means of equal knowledge (the only security for equal liberty) should be rendered, by legal provision, the common property of all classes.
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> In a republic, the people constitute the government, and by wielding its power in accordance with the dictates, either of their intelli-

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27. J. First & H. Mizell, Everybody's Business: A Book About School Discipline (Southeastern Public Education Program, American Friends Service Committee 1980).

gence or their ignorance, of their judgment or their caprices, are the makers and the rulers of their own good or evil destiny. They frame the laws and create the institutions that promote their happiness or produce their destruction. If they be wise and intelligent, no laws but what are just and equal will receive their approbation, or be sustained by their suffrages. If they be ignorant and capricious, they will be deceived by mistaken or designing rulers, into the support of laws that are unequal or unjust.

It appears, therefore, to the committee that there can be no real liberty without a wide diffusion of real intelligence; that the members of a republic should all be alike instructed in the nature and character of their equal rights and duties, as human beings, and as citizens; and that education, instead of being limited as in our public poor schools, to a simple acquaintance with words and cyphers, should tend, as far as possible, to the production of a just disposition, virtuous habits, and a rational self-governing character.[28]

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[28] *Report of the Workingman's Committee of Philadelphia,* from the Working Man's Advocate, New York City, March 6, 1830.